(7)

No. 84-498-CFX
Status: GRANTED

Title: United States, Petitioner
v.
National Bank of Commerce

Docketed:
September 27, 1984

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Wynne, Terry F.

Entry	Date	Note	Proceedings and Orders
1	Jul 18 1984		Application for extension of time to file petition and order granting same until September 27, 1984 (Blackmun, July 21, 1984).
2	Sep 27 1984	G	Petition for writ of certiorari filed.
4	Oct 29 1984		Order extending time to file response to petition until December 1, 1984.
5	Dec 3 1984		Brief of respondent Natl. Bank of Commerce in opposition filed.
6	Dec 5 1984		DISTRIBUTED. January 4, 1985
7	Dec 27 1984	X	Reply brief of petitioner United States filed.
8	Jan 7 1985		Petition GRANTED.
			**
9	Feb 14 1985		Record filed.
10	Feb 14 1985		Certified copy of C.A. proceedings & original record received. (2 volumes).
11	Feb 14 1985		Joint appendix filed.
12	Feb 21 1985		Brief of petitioner United States filed.
13	Mar 15 1985		SET FOR ARGUMENT. Monday, April 15, 1985. (3rd case).
14	Mar 22 1985		CIRCULATED.
15	Mar 23 1985	X	Brief of respondent National Bank of Commerce filed.
16	Apr 15 1985		ARGUED.

1 pp

No. 84-498 (1)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

69 pp

QUESTION PRESENTED

Section 6331(a) of the Internal Revenue Code authorizes the IRS to collect unpaid taxes by levy upon "all property and rights to property * * * belonging to" a delinquent taxpayer. The question presented is whether, where a delinquent taxpayer has an unrestricted right under his contract with a bank and state banking law to withdraw without notice to his co-depositors the full amount on deposit in a joint checking or savings account, the IRS has a corresponding right to levy on the account in satisfaction of that taxpayer's tax liability, or whether (as the court of appeals held) the IRS must negate or quantify the potential claims of all the delinquent taxpayer's co-depositors as a precondition to a valid administrative levy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 726 F.2d 1292. The opinion of the district court (App., *infra*, 18a-29a) is reported at 554 F. Supp. 110.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 30a) was entered on January 31, 1984. A timely petition for rehearing was denied on April 30, 1984 (App., *infra*, 31a). On July 21, 1984, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including September 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6321, 6331, 6332, 7403 and 7426 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Ark. Stat. Ann. §§ 67-521, 67-552 (1980) are set out in a statutory appendix (App., *infra*, 32a-38a).

STATEMENT

1. Roy Reeves owes $857 in federal income taxes for 1977, based upon an assessment made against him on December 10, 1979 (App., *infra*, 2a). He has a checking account and a savings account at the National Bank of Commerce, a banking corporation doing business in Pine Bluff, Arkansas (*id.* at 1a-3a). Both accounts are held in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves" (*id.* at 3a).[1] Each of the three, Roy, Ruby and Neva, is authorized to withdraw money up to the full amount of the outstanding balance in each account (*id.* at 3a; Stip. 2). It is not known which of the three co-depositors owned the funds before the funds were deposited in the accounts, or in what proportion (App., *infra*, 3a; Stip. 1). It was stipulated below that no evidence would be submitted as to the co-depositors' respective claims, inter sese, to the funds (App., *infra*, 3a; Supp. Stip. 1).

Section 6331(a) of the Code[2] provides that the IRS may collect the taxes of a delinquent taxpayer "by levy upon all property and rights to property * * * belonging to such person." Section 6332(a) in turn provides that anyone "in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" shall surrender such property or rights upon demand of the IRS. Pursuant to these Sections, the Commissioner, in an effort to collect Roy's unpaid taxes, served a notice of levy against the bank with respect to the two accounts described above (App., *infra*, 18a). On the date the notice of levy was served—June 13, 1980—the balance in the checking account was $322 and the balance in the savings account was $1,242 (App., *infra*, 3a). The IRS demanded that the bank pay over to it any sums owing to Roy up to a total of $857.

[1] Although the record does not reveal how the three co-depositors are related to one another, the IRS understands that Neva is Roy's wife and that Ruby is his mother.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

2. The bank refused to comply with the levy, contending that it did not know how much of the money on deposit belonged to Roy, as opposed to Ruby or Neva (App., *infra*, 1a). The government then brought this action against the bank in the United States District Court for the Eastern District of Arkansas, pursuant to Code Section 6332(c)(1). That Section provides that "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the [IRS], shall be liable in his own person" up to the value of the property or rights not surrendered or the amount of tax due, whichever is less.

The case was submitted to the district court on the bank's motion to dismiss the complaint and on cross-motions for summary judgment (App., *infra*, 18a). The district court granted the bank's motion to dismiss, concluding (*id.* at 23a) that due process mandates "something more" than the Code's levy procedures provide. In the court's view, the Due Process Clause of the Fifth Amendment obligates the IRS, when levying on property in a joint account, to identify the delinquent taxpayer's co-depositors and provide them with notice and an opportunity to be heard (App., *infra*, 24a-25a). The district court outlined the procedures it believed the Constitution requires the IRS to follow when levying on joint bank accounts.[3]

[3] The district court held that a bank, upon receiving a notice of levy, should freeze the assets in the account and provide the

3. The court of appeals affirmed (App., *infra*, 1a-17a). Although it expressed no opinion on the constitutional issues decided by the district court (*id.* at 2a, 17a), it reached the same result as a matter of statutory construction. In the court of appeals' view, the IRS, when levying on a joint bank account, must bear the burden of proving "the actual value of the delinquent taxpayer's interest in [the] jointly owned property" (*id.* at 2a). Since "the rights of the various parties" to the funds at issue here had not yet been determined (*id.* at 17a), the court concluded that the government had not shown the bank to be in possession of "property [or] rights to property * * * belonging to" Roy, as Section 6331(a) requires.

The Eighth Circuit acknowledged that, under Arkansas banking law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (App., *infra*, 6a). The court also found some force in the argument that "the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy" (*id.* at 7a). The court nevertheless refused to accept the

IRS with the names of all co-depositors (App., *infra*, 24a-25a). The IRS would then be required to notify the co-depositors and give them a reasonable time period "in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest [claimed] in the joint account" and the ground of their claim (*id.* at 25a). If the bank, on the basis of the affidavits, "believe[d] that a genuine dispute exist[ed] as to the legality of any ownership claim" made by the co-depositors, "it [might] refuse to surrender any portion of the funds so claimed" (*id.* at 29a). The IRS would then be forced to bring suit to enforce the levy, at which point "due process would require that the government * * * name the co-depositors as co-defendants with the bank" (*id.* at 25a).

IRS' contention that it "st[ood] in Roy's shoes and could do anything Roy could do," pointing out that, "at least as to ordinary creditors, [that was] not the law of Arkansas." Under Arkansas garnishment law, the court noted, the Arkansas courts had "rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account." Rather, a creditor in an Arkansas garnishment proceeding is required to "join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account." *Ibid.*[4] The court of appeals believed that a similar rule should apply in administrative levy proceedings brought under the Internal Revenue Code, and accordingly concluded that the government could not prevail without negating or quantifying the claims that Ruby and Neva might have to the funds in question.

In upholding the bank's refusal to honor the levy, the court of appeals expressed the belief that IRS administrative levies are "not normally intended for use as against property in which third parties have an interest" or "against property bearing on its face the names of third parties" (App., *infra*, 17a). The government's proper remedy in such situations, in the court of appeals' view, was to "bring[ ] suit to foreclose its lien under [I.R.C. §] 7403, joining as defendants the * * * co-owners of the account" (*ibid.*). The court appeared to agree with the government's contention that "a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy" (App., *infra*,

[4] The court observed that "[t]he rights of [bank co-depositors] *inter sese* are not determined by the cited Arkansas statutes," but rather "depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners" (App., *infra*, 6a-7a).

11a). But the court concluded that "the better reasoning" lay with the Sixth Circuit's decision in *United States* v. *Stock Yards Bank*, 231 F.2d 628 (1956), a case involving an IRS levy on co-owned United States savings bonds (App., *infra*, 8a-11a, 14a-15a).

The government's petition for rehearing with suggestion of rehearing en banc was denied (App., *infra*, 31a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal tax law in a way that conflicts with the decisions of this Court and of at least three other circuits. The decision below is erroneous, effectively preventing the IRS from levying on property even though that property is freely accessible to the delinquent taxpayer and thus could be used by him for payment of his taxes. The question presented has great administrative importance and involves substantial amounts of revenue, for the IRS serves notices of levy on several hundred thousand joint bank accounts each year. Review by this Court is therefore appropriate.

1. a. The Internal Revenue Code affords the government two principal options for collecting unpaid taxes. The taxpayer's failure to pay creates in favor of the United States a lien that attaches to "all property and rights to property, whether real or personal, belonging to such person" (I.R.C. § 6321). As soon as the lien arises, the government may initiate a plenary suit in district court to foreclose the lien and subject the delinquent taxpayer's property to payment of the tax (I.R.C. § 7403(a)). All persons claiming an interest in the property must be joined in such an action (I.R.C. § 7403(b)). See generally *United States* v. *Rodgers*, No. 81-1476 (May 31, 1983), slip op. 3-4; 4 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.1 (1981).

Alternatively, the IRS may collect unpaid taxes by administrative levy, a procedure that, unlike the procedure described above, typically "does not require any judicial intervention" (*Rodgers*, slip op. 4). Section 6331(a) provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property * * * belonging to such person or on which there is a [federal tax] lien."[5] Section 6332(a) in turn provides that "any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process." A person who honors an IRS levy is "discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property" surrendered (I.R.C. § 6332(d)). A person who refuses to honor a valid levy is "liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made" (I.R.C. § 6332(c)(1)). Third persons claiming an interest in property levied upon may bring a "wrongful levy" suit against the United States to obtain appropriate relief (I.R.C § 7426).

Administrative levy "is a summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims"

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[5] Section 6334 specifies certain types of property that are exempt from IRS levy. None of those exemptions covers the bank accounts at issue here.

(*United States* v. *Sullivan*, 333 F.2d 100, 116 (3d Cir. 1964)). The "underlying principle" justifying administrative levies is "the need of the government promptly to secure its revenues." *Phillips* v. *Commissioner*, 283 U.S. 589, 596 (1931). The constitutionality of the procedure "has long been settled." *Id.* at 595. Accord, *e.g.*, *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972); *Bull* v. *United States*, 295 U.S. 247, 259-260 (1935).

b. In this case, the IRS decided to pursue the administrative option and to collect Roy's unpaid taxes by levying upon his bank accounts. The courts of appeals have uniformly held, in accordance with the plain language of Sections 6331 and 6332, that a bank (or other person) served with an IRS notice of levy "has only two defenses for a failure to comply with the demand, [namely,] that the person is not in possession of the taxpayer's property or [that] the property is subject to a prior judicial attachment or execution." *United States* v. *Sterling National Bank*, 494 F.2d 919, 921 (2d Cir. 1974) (citing cases). Accord, *e.g.*, *Bank of Nevada* v. *United States*, 251 F.2d 820, 824 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958). Respondent has never suggested that the bank accounts at issue here were not in its possession[6] or were subject to a prior judicial attachment or execution. The only question, therefore, is whether those accounts constituted "property [or] rights to property * * * belonging to" Roy (I.R.C. § 6331(a)).

In deciding whether an entitlement amounts to "property [or] rights to property" within the meaning of Sections 6321 and 6331, "'state law controls in determining the nature of the legal interest which the taxpayer ha[s] in the property.'" *Aquilino* v. *United States*, 363 U.S. 509, 513 (1960) (quoting *Morgan* v. *Commissioner*, 309 U.S. 78, 82 (1940)). Accord, *e.g.*, *Rodgers*, slip op. 4. This principle follows from the fact that the Internal Revenue Code "creates no property rights, but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements" of the Internal Revenue Code, of course, "state law is inoperative" and the tax consequences thenceforth are dictated by federal law (*id.* at 56-57).

In the instant case, the question whether Roy had a "right * * * defined by state law" (*Bess*, 357 U.S. at 55) is measured by his contract with the bank, as enforced by relevant Arkansas statutory provisions. See *id.* at 55; *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1105-1107 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *United States* v. *Bowery Savings Bank*, 297 F.2d 380, 382-383 (2d Cir. 1961). Under Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts, without notice to his co-depositors, for his own exclusive benefit.[7] The bank for its part was obligated to honor

[6] Technically, of course, a bank account establishes a debtor-creditor relationship between the bank and its depositor. Section 6332(a) takes this technicality into account by providing that anyone "in possession of *(or obligated with respect to)* property or rights to property" shall surrender it in response to an IRS levy (emphasis added). Levies on bank accounts have been permitted since the Revenue Act of 1924, ch. 234, § 1016, 43 Stat. 343. The regulations explicitly state that "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property * * * including * * * bank accounts." Treas. Reg. § 301.6331-1(a)(1).

[7] The relevant Arkansas statutes provide that, if a checking or savings account is opened in the name of two or more persons, whether as joint tenants, tenants by the entirety, tenants

any withdrawal requests Roy might make, again up to the full value of the accounts.[8] The Eighth Circuit thus correctly concluded that, under Arkansas law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (App., *infra*, 6a).

Having thus interpreted Arkansas law, the court of appeals erred in holding that Roy did not possess "property [or] rights to property," up to the full value of the accounts, within the meaning of Section 6331(a). This Court has squarely held that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms "ha[s] 'property' or 'rights to property,' within the meaning of [the predecessor of Section 6321]." *United States* v. *Bess*, 357 U.S. at 56.[9] The Eighth Circuit itself has

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in common or otherwise, all monies deposited become the property of such persons as joint tenants, each person having the unrestricted right to withdraw the entire sum. See Ark. Stat. Ann. §§ 67-521, 67-552 (1980), *reprinted in* App., *infra*, 37a-38a.

[8] The relevant Arkansas statutes provide that "a banking institution shall pay withdrawal requests * * * and otherwise deal in any manner with the account * * * upon the direction of any one (1) of the persons named therein * * * unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required." Ark. Stat. Ann. § 67-552(d) (1980), *reprinted in* App., *infra*, 37a–38a). The bank has never suggested that such "written instructions" existed here. The Arkansas statutes further provide that the bank's payment to any one depositor constitutes "a valid and sufficient release and discharge of said bank" from co-depositors' claims, absent written notice from them not to pay. Ark. Stat. Ann. §§ 67-521, 67-522(h) (1980), *reprinted in* App., *infra*, 37a-38a.

[9] The question in *Bess* was whether a delinquent taxpayer's interest in an insurance policy covering his life constituted

held, on another occasion, that "[t]he unqualified contractual right to receive property is itself a property right subject to seizure by levy." *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (1980). It is well established that the IRS in a levy proceeding "steps into the taxpayer's shoes," that is, acquires rights no greater and no less than the taxpayer himself possesses. See, *e.g.*, *Mansfield* v. *Excelsior Refining Co.*, 135 U.S. 326 (1890); *St. Louis Union Trust Co.*, 617 F.2d at 1302; 4 Bittker, *supra*, ¶ 111.5.4, at 111-102 (citing cases). Since Roy had the right to withdraw the outstanding balance and use it to pay his taxes, the IRS, by virtue of the levy, sought to do on his behalf no more than he could have done of his own volition. In such circumstances, where a bank depositor under state law has the unrestricted right to withdraw funds from the account, "it is inconceivable that Congress * * * in-

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"property [or] rights to property" to which a tax lien could attach (357 U.S. at 55). After noting that "the rights of the insured are measured by the policy contract as enforced by [relevant state] law," the Court held that the insured did "ha[ve] 'property' or 'rights to property,' within the meaning of [the predecessor of Section 6321], in the [policy's] cash surrender value," reasoning that the insured had "the right under the policy contract to compel the insurer to pay him this sum" and thus possessed "a chose in action * * * which he could have collected from the insurance companies in accordance with the terms of the policies" (*id.* at 55, 56 (original quotation marks omitted)). Contrariwise, the Court held that the insured did not "ha[ve] 'property' or 'rights to property' in the [insurance] proceeds, within the meaning of [the predecessor of Section 6321]," reasoning that he "could not enjoy the possession of the proceeds in his lifetime" and that the proceeds were "reducible to possession by another only upon [his] death" (*id.* at 55-56). In 1966, Congress amended Section 6332, consistently with this Court's decision in *Bess*, to make clear that the IRS can levy on the cash surrender value of a life insurance policy. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b), 80 Stat. 1135 (presently codified in I.R.C. § 6332(b)).

tended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor." *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972). Accord, *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1107.

In sum, Roy possessed an unrestricted right under state law to compel the bank to pay him the entire balance outstanding in the two accounts. That right constituted "property [or] rights to property * * * belonging to" Roy within the meaning of Section 6331(a). The bank was "obligated with respect to" Roy's right to property (I.R.C. § 6332(a)), since state law required it to honor any withdrawal requests, up to the outstanding balance, that Roy might make. The bank thus had no basis for refusing to honor the levy, and the courts below erred in not holding it personally liable for its refusal.

2. In holding that Roy did not possess "property [or] rights to property" on which the IRS could levy, the court of appeals relied principally on Arkansas garnishment law. It noted (App., *infra*, 7a) that an "ordinary creditor[ ]" of a bank depositor in an Arkansas garnishment proceeding is not "subrogated to that co-owner's power to withdraw the entire account." The court of appeals reasoned that the IRS, in a Section 6331 levy proceeding, similarly does not "stand in [the delinquent taxpayer's] shoes" (App., *infra*, 7a).

The court's reasoning seriously misconceives the role of state law in resolving federal tax questions of the sort involved here. This Court has repeatedly held that state law is relevant only in "determining the *nature of the legal interest* which the taxpayer ha[s] in the property * * * sought to be reached" by the federal taxing statute. *Aquilino*, 363 U.S. at 513 (emphasis added; original quotation marks omitted). Once the nature of the taxpayer's legal interest is defined, the question

whether that interest constitutes "property [or] rights to property," as those terms are used in Section 6331(a), is a question of federal law. *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105; see *Bess*, 357 U.S. at 56. The fact that under state law ordinary creditors may be unable to reach the full value of the taxpayer's legal interest is therefore not determinative of the federal tax outcome. In *Bess*, this Court held it irrelevant that "under state law the [taxpayer's] property right * * * [was] not subject to creditors' liens," ruling that, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the predecessor of Section 6321], state law is inoperative" (357 U.S. at 56-57 (citations omitted)).

Contrary to the court of appeals' conclusion, therefore, the facts that under Arkansas law Roy's creditors (unlike Roy himself) could not draw down the entire balance in the accounts (App., *infra*, 7a) and would have to join Roy's co-depositors in a garnishment proceeding (*ibid.*) do not answer the question whether Roy's legal interest constituted "property [or] rights to property * * * belonging to" him, within the meaning of Section 6331(a). See *Bess*, 357 U.S. at 56. The federal statute, after all, refers to *the taxpayer's* rights to property, not his creditors' rights. Yet the court of appeals has effectively deprived the federal statute of all independent force here, by remitting the Service to only the rights that any creditor of the taxpayer would have under state law.

This is not to say, of course, that the rights and possibly competing claims of Roy's co-depositors are ignored under the Internal Revenue Code. In enacting the Code's summary collection procedures, Congress fully recognized that the IRS would occasionally levy in error, and that, "where the Government levies on property which, in part at least, a third person considers to

be his, he is entitled to have his case heard in court." S. Rep. 1708, 89th Cong., 2d Sess. 29 (1966). Congress accordingly provided, in Section 7426 of the Code, that a person claiming an interest in property seized for another's taxes may bring a "wrongful levy" action against the United States to have the property (or the proceeds of its sale) returned. Congress likewise provided, in Section 6343(b), that an aggrieved claimant may file, before proceeding to court, an administrative request for return of the property at issue. See Treas. Reg. § 301.6343-1(b)(2). This Court has repeatedly sustained the constitutionality of this post-seizure hearing procedure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips*, 283 U.S. at 595) because "the very existence of the government depends upon the prompt collection of the revenues" (*G.M. Leasing Corp.*, 429 U.S. at 352 n.18).

In its solicitude for the potential claims of Roy's co-depositors, the court of appeals has ignored the statutory scheme that Congress established. Congress determined that the interests of the government in the speedy collection of taxes and the interests of other claimants to the delinquent taxpayer's property are best reconciled by permitting the IRS to levy on the taxpayer's assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial hearing. The court of appeals erred in concluding that such ownership disputes must be finally resolved—and that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required.

3. In holding that Roy did not have "property [or] rights to property" in the bank accounts at issue, the decision below conflicts, either directly or in principle, with decisions of this Court and of other courts of appeals.

a. The courts of appeals for the Second, Fifth, and Ninth Circuits have held that a delinquent taxpayer's unrestricted right, defined by state law and by his contract with the bank, to withdraw funds from a bank account constitutes "property" or a "right to property" subject to IRS levy, regardless of the fact that there exist other claims to the funds on deposit and that the question of ultimate ownership is unresolved. In *United States* v. *Sterling National Bank*, 494 F.2d 919 (2d Cir. 1974), a bank contended that its depositor had no "property [or] rights to property" in a checking account because the bank had an unexercised right of set-off (494 F.2d at 921). After consulting relevant state law, the Second Circuit (*id.* at 922) rejected this argument:

> Under any realistic definition of "property" the full amount in [the delinquent taxpayer's] account was his property or his right to property. Until the bank acted to restrict his right to draw on the funds, [the taxpayer] was entitled to write checks up to the full amount in the account. * * * At any time up to when the IRS served its notice of levy, [the taxpayer] could have written a check payable to the IRS for the balance of his account. Here the IRS was asserting no right to the funds in the checking account that [the taxpayer] did not already have.

The Second Circuit accordingly held that "all the funds in [the delinquent taxpayer's] checking account were his property" and hence were subject to levy to satisfy his taxes (*ibid.*).

The same conclusion has been reached, for substantially similar reasons, by the Fifth and Ninth Circuits and by numerous district courts. See *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1107 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977) (delinquent taxpayer had "property [or] rights to property" so long as he "was permitted to withdraw from

his account"); *Bank of Nevada* v. *United States*, 251 F.2d 820, 824-825 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958); *United States* v. *First National Bank*, 348 F.Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972) (so long as "the depositor is free to withdraw from his account, * * * it is inconceivable that Congress * * * intended to prohibit the Government from levying on that which is plainly accessible to [him]"); *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S. D. Cal. 1965) (co-depositor had "property [or] rights to property" up to full value of joint account where each depositor "was entitled to the whole of said account"); *Tyson* v. *United States*, 63-1 U.S. Tax Cas. (CCH) ¶ 9300 (D. Mass. 1962) (same); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953) (same). The Eighth Circuit's holding in this case directly conflicts with these decisions.[10]

b. The decision below is also contrary to numerous cases holding, in a wide variety of contexts, that potential disputes as to ownership do not negate the existence of "property [or] rights to property" subject to levy, and that, "[w]hen someone other than the taxpayer claims an interest in [such] property or rights to property * * *, his exclusive remedy against the United States is a wrongful levy action under I.R.C.

[10] As noted in the text, a number of the cited decisions involved individual rather than joint bank accounts, where the potentially competing claim was that of the bank rather than of a co-depositor. In each case, however, the dispositive question was whether the delinquent taxpayer's legal rights vis-a-vis the bank under state law—*i.e.*, his unrestricted right to draw down the full outstanding balance—constituted "property [or] rights to property" within the meaning of Section 6331. The cited decisions and the decision below are in direct conflict on this question, although the question has arisen in factual contexts that involve immaterial differences in the identities of the competing claimants and the nature of their claims.

§ 7426." *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980). Accord, *e.g.*, *Valley Finance, Inc.* v. *United States*, 629 F.2d 162, 170-171 (D.C. Cir. 1980), cert. denied, 451 U.S. 1018 (1981). As noted above (see page 8, *supra*), the courts of appeals have uniformly held that the Code admits of only two defenses to compliance with an IRS levy—that a person is not in possession of the taxpayer's property, or that the property is under prior judicial attachment. See, *e.g.*, *United States* v. *Sterling National Bank*, 494 F.2d at 921; *Bank of Nevada* v. *United States*, 251 F.2d at 824; *Commonwealth Bank* v. *United States*, 115 F.2d 327, 330-331 (6th Cir. 1940). The fact that other parties may have competing claims to the property is not one of these defenses.[11] In attaching dispositive force to the possibility that Roy's co-depositors "might have had a claim against Roy" if he had exercised his right to withdraw the funds (App., *infra*, 6a), and in rejecting the government's contention

[11] The court of appeals below interpreted this Court's decision in *United States* v. *Rodgers*, *supra*, to "impl[y] that levy is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties" (App., *infra*, 17a). This Court's decision in *Rodgers* contains no such implication. Indeed, in *G.M. Leasing Corp.*, 429 U.S. at 350-351, the Court upheld an IRS levy on property "bearing on its face the name of a third party"—a straw man who was found to be the taxpayer's alter ego. The lower courts have repeatedly sustained levies in such circumstances. *E.g.*, *Valley Finance, Inc.*, 629 F.2d at 165 (alter ego of taxpayer); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499 (E.D. Pa. 1977) (nominee of taxpayer); *James E. Edwards Family Trust* v. *United States*, 572 F. Supp. 22 (E.D. N. M. 1983) (trust found to be a nullity). As noted in the text, the courts with regularity have sustained levies against property "in which third parties have an interest." And as noted below (see page 19, *infra*), the IRS serves notices of levy on several hundred thousand joint bank accounts (not to mention other forms of jointly-held property) every year.

that his co-depositors' "only recourse [in that event] would be a Section 7426 action for wrongful levy against the government" (App., *infra*, 15a), the decision below conflicts, in fundamental principle, with these cases.[12]

c. Finally, the decision below does not comport with governing principles, established in decisions of this Court and of other circuits, respecting the role properly played by state law in determining the validity of IRS levies and liens. As noted above (see pages 12-13, *supra*), state law is relevant only "in determining the nature of the legal interest which the taxpayer ha[s] in the property" (*Aquilino*, 363 U.S. at 513). Whether the taxpayer's interest, as thus defined, amounts to "property [or] rights to property" within the meaning of Section 6331 is a question of federal law (*Bess*, 357 U.S. at 56-57; *United States* v. *Citizens & Southern Bank*, 538 F.2d at 1105). State-law restrictions on ordinary creditors' rights are irrelevant in answering this question (*Bess*, 357 U.S. at 56-57). In holding the provisions of Arkansas garnishment law to be dispositive of the question whether Roy had "property [or] rights to property" for federal tax purposes, the Eighth Circuit ignored these well-settled principles.

4. The question presented is of utmost administrative importance. The decision below, if allowed to stand and if followed by other courts, would impose burdens of staggering dimension on the IRS, the banking system, the federal courts, and taxpayers themselves. Even absent a circuit conflict, therefore, the case would merit this Court's review.

a. Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. During the past three and a half years, the IRS has served nearly four million notices of levy, principally on employers and banks.[13] The chief advantage of administrative levies is their nonjudicial nature, a characteristic that renders the collection process both expeditious and inexpensive. Although a levy does not determine ultimate ownership rights where such rights are in dispute, it does protect the government "against diversion, loss, or concealment of the property" while the dispute is being resolved (4 Bittker, *supra*, ¶ 111.5.4, at 111-108).

[12] In rejecting this line of authority, the court of appeals relied primarily on *United States* v. *Stock Yards Bank*, 231 F.2d 628 (6th Cir. 1956). The Sixth Circuit there ruled that the IRS could not levy on United States savings bonds held in the names of a husband and wife to satisfy the former's tax liability, reasoning that "[p]roof of the actual value of the taxpayer's interest was an essential element of the government's case" (231 F.2d at 631). In our view, *Stock Yards Bank* can be distinguished on its facts. The Sixth Circuit emphasized that the form of co-ownership in which the U.S. savings bonds were held was neither a joint tenancy nor a tenancy by the entirety, but "rather [was] an estate the limitations and conditions of which are delineated by the terms of the contract and by federal law" (*id.* at 630). The applicable federal regulations provided that "if a debtor * * * is not the sole owner of the bond, payment will be made only *to the extent of his interest therein*, which must be determined by the court or otherwise validly established" (31 C.F.R. 315.13 (1955), quoted in 231 F.2d at 631 (emphasis added by the court of appeals)). In *Stock Yards Bank*, therefore, other, more particularized provisions of federal law placed a gloss on the term "property [or] rights to property" as generally used in Section 6331(a); the provisions of Arkansas garnishment law, obviously, can impose no such gloss on that term here. Although we think that the Sixth Circuit thus reached the right result on the facts presented in *Stock Yards Bank*, we disagree with much of that court's reasoning and believe that the case should be confined to the narrow situation there involved—*viz.*, an IRS levy on co-owned United States savings bonds.

[13] The IRS has provided us with the following breakdown of levies served during fiscal 1981-1983 and during the first half of fiscal 1984:

	Total Levies	*Levies on Banks*
FY 1981	740,103	308,622
FY 1982	1,058,452	441,374
FY 1983	1,390,900	580,005
FY 1984 (1st half)	741,900	300,000

It is common knowledge that American taxpayers frequently hold financial assets, particularly bank accounts, in joint name. Indeed, during the past three and a half years, the IRS served notices of levy on some 800,000 joint bank accounts.[14] The IRS estimates that, in about half these cases, the account was held in the names of a delinquent taxpayer and a "third party" (*i.e.*, a party who did not share liability for the tax delinquency), the levy being predicated on the delinquent taxpayer's right unilaterally to withdraw the entire balance. Very few of these cases resulted in litigation, be it an enforcement action by the Commissioner or a wrongful levy action by the co-depositor. Rather, the bank simply paid the funds to the IRS, the taxpayer acquiesced, the co-depositor raised no objection, and no one ever went to court.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the ultimate "ownership interests" of the delinquent taxpayer and his various co-depositors. Practically speaking, this will make administrative levies impossible whenever a delinquent taxpayer's property is titled in joint name. The burden of sorting out the potential claims inter sese of joint tenants is "an impossible burden to cast upon a party not privy to the confidential relationship normally existing between such co-owners." Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 629 (1968). As the Eighth Circuit observed below, the "rights of the co-owners *inter sese* * * * depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among [them]" (App., *infra*, 6a-7a). Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, 77 Yale L.J. at 629), typically entailing "[a] long series of deposits which cannot be traced to their source, and a similar series of withdrawals which cannot be traced to their destination." *Park Enterprises, Inc.* v. *Trach*, 233 Minn. 467, 471-472, 47 N.W. 2d 194, 197 (1951). The decision below invites self-serving affidavits by delinquent taxpayers and their co-depositors, all of whom will typically be related, if not by blood, by friendship or commercial ties. Quite obviously, proving the respective "ownership interests" of such co-depositors is not a burden that the IRS, at the administrative levy stage, would find easy to bear.

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[14] Statistics referred to in this petition are derived from IRS records and were provided to us by the Service.

Faced with the difficulty of resolving ownership disputes administratively, the IRS, if it wished to pursue a delinquent taxpayer's interest in a joint account, would have no alternative but to follow the Eighth Circuit's suggestion (App., *infra*, 17a) and bring a lien foreclosure suit under Section 7403(b), joining all co-depositors as defendants. But this would place an enormous burden on the Commissioner and on the courts. As noted above, the IRS in the past three and a half years has served notices of levy on some 400,000 joint bank accounts titled in the names of a delinquent taxpayer and a "third party." The Service estimates that slightly more than half these cases—200,000 or more—would have involved sufficient tax liabilities to justify the time and expense of litigation. This number of additional cases would cost the government tens of millions of dollars to litigate and would impose a tremendous strain on the federal district courts. The fiscal impact would be aggravated by the delay in collecting hundreds of millions of dollars in revenues while the litigation was pending, as well as by the risk that the bank accounts would be depleted in the interim. And since about half the cases—some 80,000 per year, projecting from the figures above—would in all proba-

bility be dropped as not warranting the expense of litigation, collection of the associated revenues in those cases could be foregone entirely.

Given the prohibitive cost of litigating over levies on joint bank accounts, the Commissioner would be forced by the decision below to consider other collection measures, such as seizures of delinquent taxpayers' houses, cars, and other tangible property. At present, the IRS generally tries to collect unpaid taxes by levy on intangible assets rather than by seizure of tangible property—a preference explained by the fact that seizure is a slow and drawn-out process, often burdensome to the taxpayer, invariably costly for the IRS, and usually unpleasant for all concerned.[15] If the decision below is allowed to stand, the Commissioner would have no alternative but to take more collection action against tangible property—a step about which neither the Commissioner nor taxpayers are likely to be enthusiastic.

Finally, the decision below would provide tax protestors and other tax evaders with a new and effective means to delay or defeat collection of the tax. Some 37,000 illegal protest returns were filed in fiscal 1983, a six-fold increase over the comparable figure for 1978. Tax protestors can take advantage of the Eighth Circuit's decision simply by adding extra names—accommodating relatives, or other tax protestors—to their bank accounts. This might be all that would be necessary to immunize relatively small accounts from enforced collection, since the Service would not likely find it profitable to litigate such cases. Alternatively, a taxpayer with a delinquent tax liability might attempt to

[15] During fiscal 1983, for example, the IRS served 1,390,900 levies and executed only 15,554 seizures—a ratio of about 100 to one. Seizures are far more expensive because they entail, *e.g.*, courthouse searches for prior liens, expenses of appraising and advertising the property, and costs of execution.

"launder" deposits to a joint account through a "third party" co-depositor, hoping that the Commissioner would be unable to prove whose money is whose; although such schemes can be exposed, the attendant costs are large. And, significantly, tax protestors might well rely on the decision below to bring suit against banks that continue to honor—correctly, in our view—IRS levies on joint accounts of the sort involved here. Although banks would probably have good defenses to such suits,[16] the expense of litigating even frivolous cases could be substantial.

In *Bull* v. *United States*, 295 U.S. 247, 259 (1935), this Court declared that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." The administrative levy system is a time-honored, congressionally-authorized collection technique designed to ensure that this need is equitably met. The decision below poses a serious threat to the efficacy of that system.

[16] As we have noted (page 7, *supra*), Section 6332(d) discharges a bank "from any obligation or liability to the delinquent taxpayer" with respect to property surrendered pursuant to an IRS levy. Although that Section does not immunize the bank against suits by the delinquent taxpayer's co-depositors, state law typically provides (as Arkansas law does here) that the bank's payment to one depositor relieves it of liability to others. See page 10 note 8, *supra*. And since the government stands in the shoes of the delinquent taxpayer when levying on a bank account, the bank's payment to the IRS should likewise insulate it from co-depositors' suits. See, *e.g.*, *United States* v. *Bowery Savings Bank*, 297 F.2d 380 (2d Cir. 1961); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499 (E.D. Pa. 1977). Although there is thus little basis in fact for the court of appeals' concern (App., *infra*, 14a-15a) that the bank would "expose [itself] to double liability" by honoring the levy at issue here, the costs that such litigation would impose on banks—litigation that, ironically, would be encouraged by the decision below—cannot lightly be dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

SEPTEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1218

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

On Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: September 15, 1983
Filed: January 31, 1984

Before BRIGHT, ARNOLD, and FAGG, *Circuit Judges.*

ARNOLD, *Circuit Judge.*

The United States claims that one Roy J. Reeves has not paid all of his income tax for the year 1977. There are two bank accounts in the National Bank of Commerce of Pine Bluff, Arkansas, in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The government served a notice of levy on the bank, demanding that enough of the accounts to satisfy the taxpayer's obligation be paid over to it. The bank, protesting that it did not know how much of the account belonged to Roy, as opposed to Ruby or Neva, refused. The government then brought this action under Section 6332(c)(1) of the Internal Revenue Code of 1954, 26 U.S.C. § 6332(c)(1) (1976), seeking judgment against

the bank "in [its] . . . own person and estate" for the amount of taxes it claimed Roy owed. The District Court[1] held for the bank on summary judgment. *United States* v. *National Bank of Commerce*, 554 F. Supp. 110 (E.D. Ark. 1982). It held that the Due Process Clause of the Fifth Amendment requires the government, when serving a Section 6331 notice of levy on a bank account bearing names of persons other than the delinquent taxpayer, to notify the other ostensible owners of the account, and give them a chance to show how much of the account they own. Otherwise, the levy statutes would deprive the other owners of their property without due process of law.

We do not reach the constitutional questions decided by the District Court. In fact, we have a duty not to reach them if the statutes themselves, interpreted aright, in fact give adequate protection to the non-taxpayers' property rights. The only appellate case in point, *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956), holds that the government cannot succeed without providing the actual value of the delinquent taxpayer's interest in jointly owned property. We follow *Stock Yards Bank*, which reached its result as a matter of statutory construction, not due process, and affirm the District Court's judgment on that ground.

I.

The facts are stipulated. When the complaint was filed, Roy J. Reeves owed $856.61 in income tax for the year 1977.[2] On June 10, 1980, there were in the National Bank of Commerce a checking account and a savings account in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The balance in the checking account was $321.66, and the balance in the savings account was $1,241.60. Any one of the three parties, Roy, Ruby, or Neva R., was authorized to withdraw money from the accounts. We do not know who owned the money before it was deposited, nor do we know in what proportion the accounts are owned. The government and the bank, in fact, have agreed that "[n]o further evidence as to the ownership of the monies in the subject bank accounts will be submitted." Supplement to Stipulation of Facts, Designated Record (D.R.) 13. The government's notice of levy, as amended on June 26, 1980, demanded that the bank pay over to it the $856.61 owed by Roy. The bank refused. The government brought this action on September 28, 1981, and the District Court granted the bank's motion for summary judgment on December 16, 1982.

[1] The Hon. Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

[2] More precisely, the government claimed this amount, and the bank did not dispute the claim. Reeves is not a party to this case. We do not know if he admits tax liability, or what defenses he might have to it.

II.

Under Section 6331(a) of the 1954 Code,

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary [of the Treasury] to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

Property on which such a lien exists is described in Section 6321:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person.

"[A]ny person in possession of . . . property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights . . . to the Secretary." Section

6332(a). And if he "fails or refuses" to do so, he "shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made. . . ." Section 6332(c)(1).

The government's position is simple. The bank had possession of rights to property belonging to the taxpayer. (Or, more accurately, the bank owed the taxpayer money. Only a banker has money in a bank. The depositors are creditors of the bank.) The bank failed to surrender these rights in response to a levy. It is therefore personally liable to the United States for the amount in the accounts, but not in excess of the amount owed in taxes. If someone else, Ruby or Neva, also had an interest in the account, their remedy is to sue the government for wrongful levy under Section 7426(a)(1), which gives an action to "any person," other than the taxpayer, "who claims an interest in . . . property and that such property was wrongly levied upon. . . ."

We think analysis will be aided by approaching the issue in two stages. First, what property or property rights of Roy Reeves did the bank have in its possession? Second, what obligation does the statute impose on the bank with respect to that property? The first question depends on state law, see *Aquilino* v. *United States*, 363 U.S. 509, 512-14 (1960), the second on federal law.

A.

Two Arkansas Statutes are relevant. Ark. Stat. Ann. § 67-521 (1980)[3] provides that when a deposit is made

[3] This statute was repealed by 1983 Ark. Acts No. 843, § 2. The repeal is effective March 25, 1983, so the parties' rights in this case are governed by the old statute. The substance of this statute is now codified at Ark. Stat. Ann. § 67-522(a) (1983).

in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit . . . shall become the property of such persons as joint tenants, and the same . . . may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

And Ark. Stat. Ann. § 67-552 (1980), *amended by* 1983 Ark. Acts No. 843, § 1, provides, in pertinent part, as follows:

> 67-552. *Accounts and certificates of deposit in two or more names.*—Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:
>
> * * * * *
>
> (d) If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit].

* * * * *

> (h) The person to whom such account or certificate of deposit is issued may pledge, withdraw or receive payment and any such payment made by the banking institution shall be a complete discharge as to the amount paid.

The deposit agreement or signature card is not in the record. We do not even know whether the three Reeveses whose names are on the account are related by blood or marriage. All we know is that the account is in the names of Roy or Ruby or Neva. One might think that Section 67-521, quoted above, means that Roy, Ruby, and Neva are joint tenants, and that each of them therefore owns one-third of the account, with right of survivorship upon the death of either or both of the others. But the statute has not been so construed. *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), holds that the statute was

> passed for the protection of the bank in which the deposit was made.... The statute effects no investiture of title as between the depositors themselves, but only relieves the bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved.

199 Ark. at 617, 135 S.W.2d at 841. *Accord, McGuire* v. *Benton State Bank*, 232 Ark. 1008, 1012, 342 S.W.2d 77, 79 (1961).

Thus, Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank. But they might have had a claim against Roy for conversion. The rights of the co-owners *inter sese* are not determined by the cited Arkansas statutes. Those rights depend on the intention of whoever deposited the

money, or on whatever agreement, if any, might have been made among the co-owners, or on some other applicable rule of state law. If, for example, a spouse makes a deposit in a bank account that bears both spouses' names, a tenancy by the entirety is created, defeasible by either spouse at will simply by making a withdrawal. *E.g., Black* v. *Black*, *supra*. But here we do not know whether Roy is married to Ruby or Neva. In fact, both the government and the bank have studiously avoided finding out. Nor do we know whether any of the co-owners has given the notice to the bank that the statute mentions. In short, we know, or presume, that each co-owner could withdraw all of both accounts, but that is all we know.

It might be argued that the very right, conferred by statute, to make withdrawals is a "right to property" belonging to Roy, on which the government could levy. The government, on this view, would stand in Roy's shoes and could do anything Roy could do, subject to whatever duties Roy owes to Ruby or Neva. But that, as [*sic*] least as to ordinary creditors, is not the law of Arkansas. In *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W. 2d 752 (1964), the Supreme Court specifically rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account. Instead, a creditor must join both co-owners as defendants, and the co-owner who is not the debtor may show by parol or otherwise the extent of his or her interest in the account. Only that portion of the account not so shown to belong to the non-debtor co-owner may be reached by the other co-owner's creditor on a garnishment.

B.

We now turn to the cases interpreting the levy statutes, Sections 6331 and 6332, and their predecessors. Distress and sale of goods of taxpayers who refuse to pay have been authorized ever since the First Con-

gress. Act of March 3, 1791, c. 15, § 23, 1 Stat. 204. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977). The case most nearly in point for present purposes is *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956). There, the Internal Revenue Service served a levy on the bank, which had in its possession 150 $25.00 U.S. Savings Bonds, each registered in the names of "Clarence J. Theobald or Mrs. Theas Theobald." Clarence J. Theobald owed income taxes. Mrs. Theas Theobald, who was his wife, did not. The bank refused to honor the levy, and the United States brought suit to hold it personally liable.[4] The Court of Appeals, speaking through Judge (later Mr. Justice) Stewart, held for the bank.

The Court first described the incidents of co-ownership of Series E bonds:

> [A] co-owner may alone present the bond for redemption, receive payment in full, and thereby eliminate the other co-owner's interest in the bond, so far at least as the issuer is concerned. 31 Code Fed. Reg. § 315.45.
>
> As between two co-owners, however, the regulations as well as judicial decisions have recognized that the extent of the property interest of each is a question of fact, not of law. One co-owner may as a matter of fact be the sole owner of the bond; he may be a half owner; he may have some other fractional ownership.

231 F.2d at 631. In the case before it, the Court said,

> the government adduced no evidence to establish the extent, if any, of [the taxpayer's] ... property interest in [the bonds].... Proof of the actual

[4] Suit was brought under Section 3710 of the Internal Revenue Code of 1939, 26 U.S.C. § 3710 (1952). This predecessor statute does not differ in any relevant way from §§ 6331 and 6332 of the present Code.

> value of the taxpayer's interest was an essential element value of the government's case under the statute, and for lack of such proof the case falls.

Ibid. In support of this result, the Court cited a number of "decisions relating to *joint bank accounts* and insurance policies," *ibid.* (emphasis ours) and described them as "closely analogous."

The Sixth Circuit further explained:

> It should be pointed out ... that distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But is [*sic*] is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.
>
> There is available to the government an alternative remedy well-designed to resolve the issues in the present case. Under Section 3678 of the Internal Revenue Code of 1939[5], the United States can bring suit against the bank to enforce a lien on the bonds and name both the taxpayer and his wife co-defendants. In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all parties fully protected.

Id. at 631-32 (citation and footnote omitted).

It is at once apparent that these words might have been written with just the present case in mind. We see no relevant different between *Stock Yards Bank* and the case now before us. The government, Brief for Ap-

[5] The present version of this statute is Section 7403 of the 1954 Code, which is equally available to the government here. See 231 F.2d at 632 n.2.

pellant p. 18, offers only the following suggested distinction:

> *Stock Yards Bank* involved savings bonds registered in the name of taxpayer and his wife as co-owners. The court required the Government to bring a lien enforcement acton for a judicial determination of ownership interests. Federal law provides in the case of savings bonds that ownership rights are to be determined by an agreement of the co-owners or by valid judicial process. See Treasury Regulations Governing U.S. Savings Bonds, Series A, B, C, D, E, F, G, H, J, and K, and U.S. Savings Notes, 31 C.F.R. Sec. 315.21(a). Thus, the holding in *Stock Yards Bank* took place in a significantly different legal environment than the one here involved.

We reject this argument. Certainly the "legal environment" of *Stock Yards Bank* is "different": there, the rights of co-owners depended on federal law; here, they depend on state law. But the difference is without legal significance. It pertains only to the law governing the nature of the taxpayer's property rights. It has nothing to do with the operation of the levy statutes on those rights, once their nature and extent are ascertained. Here, as in *Stock Yards Bank*, there are co-owners who may demand full payment, and whose rights may be affected if the levy is honored. It matters not which sovereign in our federal system conferred the rights at stake.[6]

[6] It might also have been argued that *Stock Yards Bank* was decided before Section 7426 of the present Code, added by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1143, became law. This is the provision that gives non-taxpayers an express remedy against the United States when its collection effort wrongfully interferes with their property. The answer is that before 1966 third parties "had available an equivalent judicially-created remedy in which [they] . . . could have contested the propriety of [a] . . . notice of levy." *United States* v. *Weintraub*, 613 F.2d 612, 623 (6th Cir. 1979). The statements that no such remedy existed before 1966, appearing in *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980), and *Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977), seem to be mistaken. See the full discussion in *Gordon* v. *United States*, 649 F.2d 837 (Ct. Cl. 1981).

We conclude, then, that a holding for the government here would place this Court in square conflict with the Sixth Circuit.[7]

C.

The government also contends that a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy. There are unquestionably such cases. We choose to follow *Stock Yards Bank* instead.

1. Only three of the cases that tend to support the government's position are from courts of appeals. Two of these are actions by third parties against the United States for wrongful levy under § 7426. In both of these two, the action was held barred by the nine-month limitations period fixed by Section 6532 of the Code for

[7] Other cases, some of which are cited in *Stock Yards Bank*, support its reasoning to one degree or another. Because each of them is at least arguably distinguishable, we do not set out their holdings at length. See *United States* v. *Bowery Sav. Bank*, 297 F.2d 380, 385 (2d Cir. 1961) (Friendly, J.) (*held*, for the government; *sed aliter* if an assignee of the savings account levied on had, before the levy, notified the bank of his claim); *Raffaele* v. *Granger*, 196 F.2d 620, 623 (3d Cir. 1952) (warrant of distraint against bank quashed; "The United States has no power to take property from one person, the innocent spouse, to satisfy the obligation of another, the delinquent spouse."); *United States* v. *New England Merchants Nat'l Bank*, 465 F. Supp. 83 (D. Mass. 1979); *United States* v. *Emigrant Indus. Sav. Bank*, 122 F. Supp. 547 (S.D.N.Y. 1954); *United States* v. *Aetna Life Ins. Co.*, 46 F. Supp. 30 (D. Conn. 1942).

such actions. In *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733 (5th Cir. 1980), the Revenue Service served a notice of levy on the Army Corps of Engineers, which owed money jointly to the taxpayer, a prime contractor, and to the plaintiff, a subcontractor. The Corps honored the levy. The plaintiff waited more than nine months to bring its Section 7426 action against the government, and therefore it lost its case. In the course of its opinion, the Fifth Circuit does say that the "Corps was required by I.R.C. § 6332 to turn over funds due" to the taxpayer, 624 F.2d at 739. If this statement is read as meaning that the duty to turn over the funds included even that portion of the money to which the plaintiff subcontractor, as opposed to the taxpayer prime contractor, was entitled, then the opinion does, to that extent, support the government's position here, though probably only in dictum. Another portion of the opinion, on the other hand, remarks that the Corps in fact had honored the levy, and that it was therefore unnecessary to speculate what rights the IRS would have had (a Section 6332 action against another federal agency?) if the levy had been refused. *Id.* at 737 n.5. The implication is that a different sort of question is presented by an action to impose personal liability on a person refusing to honor a levy. That is of course exactly the posture in which the present case presents itself.

Dieckmann v. *United States*, 550 F.2d 622 (10th Cir. 1977), is the same sort of case. A Section 7426 action was held barred by limitations. The third-party, non-taxpayer plaintiff argued that the statute should not begin to run until he received notice of the levy on the property in which he claimed an interest. The Court held that the United States had no duty to give such notice, even when it knew that a third party had a purchase-money security interest in the property of the taxpayer on which it planned to levy. Again, the case cuts in the government's favor, but it is not direct authority for the proposition—which the government must sustain here—that the holder of the property could not have asserted, as a defense to a Section 6332 action to enforce the levy, that someone other than the taxpayer had an interest in the property.

The third case in this group of appellate decisions is *United States* v. *Citizens & Southern Nat'l Bank*, 538 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). It does say that a bank may not defend against a Section 6332 action to enforce a levy by showing that it had a lien on the taxpayer's account prior to that of the United States. 538 F.2d at 1106. The opinion also says, however, that the result would be otherwise if the bank had taken some positive action, before the levy, to assert a set-off against the account in order to collect money owed to it by the taxpayer-depositor. The import of the case is therefore less than clear. It also seems to us a strange rule of law that a bank with a prior lien on an account must turn over the account in response to a levy, and then litigate its lien in a subsequent Section 7426 action, instead of being allowed to assert the lien as at least a partial defense to the government's Section 6332 action. Such a rule breeds litigation and multiplies expense for no good purpose. *Quaere*, whether the bank would have been allowed, in the government's action to enforce the levy, to plead a Section 7426 counterclaim.

None of these cases even cites *Stock Yards Bank*, and none of them directly and necessarily conflicts with it. We can disagree with the implications of these three cases without creating a direct conflict with another circuit. We cannot hold for the government without doing so, because such a holding would be at war with *Stock Yards Bank*. We feel some compunction about making more work for the Supreme Court by disagreeing with the only clear appellate precedent in point. Holmes said that he would dissent only when he had "got the blood of controversy in [his] ... neck."[8] The same may be

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[8] 1 Holmes-Laski Letters 266 (Howe ed. 1953).

said, as a rule, about disagreeing with another court of appeals and creating for the first time a clear conflict in the circuits.

2. The government also relies on a number of district-court cases, and some of them are clearly in point and supportive of its position. *United States* v. *Equitable Trust Co.*, 49 AFTR2d 82-723 (D. Md. 1982); *Sebel* v. *Lytton Sav. & Loan Ass'n*, 15 AFTR2d 488 (S.D. Cal. 1965); *Determan* v. *Jenkins*, 111 F. Supp. 604 (N.D. Ga. 1953); *United States* v. *Third Nat'l Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953).[9] See also *Douglas* v. *United States*, 562 F. Supp. 593 (S.D. Ga.), *aff'd mem*, No. 83-8197 (11th Cir. Dec. 23, 1983); *DiEdwardo* v. *First Nat'l Bank of Bath*, 41 AFTR2d 78-1370 (E.D. Pa. 1978); *Tyson* v. *United States*, 63-1 USTC 87,736 (D. Mass. 1962).[10] We can of course disagree with any of these cases withut creating a conflict in the circuits. But the real question is, not whether an opinion was written by a district court or by a court of appeals, but which opinion is the better reasoned. Most of the district-court opinions cited are more like statements of results than essays written to give a result logical support.[11]

3. So where does the better reasoning lie? We think it lies with *Stock Yards Bank*. For one thing, the con-

[9] The first two cases in this group, both decided after *Stock Yards Bank*, do not even cite it. *Stock Yards Bank* at least acknowledges *Third Nat'l Bank* with a *But see*. 231 F.2d at 631.

[10] The govrnment also cites *United States* v. *Capital Sav. Ass'n.*, 83-2 USTC 88,111 (N.D. Ind. 1983), but there the bank was allowed to show, in a § 6332 action, that a non-taxpayer owned half the account, and judgment was entered against the bank only for the other half.

[11] This is a statement of fact, not a criticism. The district courts are often hard put to it just to decide what the result should be in the ever-growing numbers of cases that confront them, let alone write a full opinion, and the same thing can, unhappily, be increasingly said of the courts of appeals as well.

trary rule might expose the bank to double liability. If it pays over to the Revenue Service the money demanded to pay Roy's taxes, it may have to pay again after being sued by Ruby or Neva. The government replies, first, that this is irrelevant, that Section 6332 does not say that potential double liability is a defense, and therefore it is not. If the bank has to pay twice, too bad. There are cases that so hold. *E.g.*, *United States* v. *Third Nat'l Bank & Trust Co.*, *supra*, 111 F. Supp. at 156. We do not accept such a wooden reading of the statute. Such a callous indifference to natural justice should not be attributed to Congress in the absence of clear statement.

The government argues in the alternative that the levy statutes themselves give anyone honoring a levy a complete defense, against taxpayers and non-taxpayers alike. On this view, the non-taxpayer's only recourse would be a Section 7426 action for wrongful levy against the government. Again, there is authority to support this view. *E.g.*, *Sebel* v. *Lytton Sav. & Loan Ass'n*, *supra*, 15 AFTR2d at 489. But no reasoning is given—only an *ipse dixit*—and the words of the levy statute just will not yield this meaning.

Section 6332(d) provides as follows:

> (d) Effect of honoring levy.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obli-

gation or liability to any beneficiary arising from such surrender or payment.[12]

Plainly, one who honors a levy is discharged from liability only "to the delinquent taxpayer," except in the special case of life insurance. There is not even an implication that Congress intended to supplant a non-taxpayer's common-law remedy for conversion.

4. Dicta in a recent opinion of the Supreme Court also support our decision to follow *Stock Yards Bank*. The case is *United States* v. *Rogers*, 103 S. Ct. 2132 (1983), and it involved the government's right to use Section 7403, the lien-foreclosure statute, to collect taxes from property in which both the taxpayer and another had an interest. In the course of its opinion, the Court also discussed that other collection tool, the Section 6331 levy and distraint, and it had this to say:

> Section 6331, unlike § 7403, does not require notice and hearing for third parties, because *no rights of third parties are intended to be implicated by § 6331*. Indeed, third parties whose property or interests in property have been seized *inadvertently* are entitled to claim that the property has been "wrongfully levied upon," and may apply for its return either through administrative channels, 26 U.S.C. § 6343(b), or through a civil action filed in a federal district court, § 7426(a)(1); see §§ 7426(b)(1), 7426(b)(2)(A).

[12] The reference to subsection (b) is to a special rule passed for levies on life-insurance and endowment contracts. It provides that the issuer of such a contract, upon being served with a levy, must pay over whatever amount of money the taxpayer could have had advanced to him. The provision was added to change the rule of cases such as *United States* v. *Aetna Life Ins. Co.*, *supra*, 46 F. Supp. at 34-35, that a life-insurance company is not obliged to pay over the cash-surrender value of a policy owned by the taxpayer, because to do so would destroy or affect the rights of others, for example, the beneficiary. There is no such special provision with respect to joint bank accounts or other kinds of property in which non-taxpayers have an interest.

103 S. Ct. at 2144. (Emphasis ours; footnote omitted.)

This passage implies that levy is not normally intended for use as against property in which third parties have an interest, and that the Section 7426 remedy is designed to protect those third parties whose property has been seized "inadvertently." The Supreme Court evidently did not contemplate the use of Section 6331 as against property bearing on its face the names of third parties, and in which those third parties likely have a property interest. The joint bank account involved here is just that type of property, and the government's attempt to seize it, no matter how much of it Roy owns, is not at all inadvertent. *Accord*, *Mansfield* v. *Excelsior Ref. Co.*, 135 U.S. 326, 341 (1890) (cited with approval in *Rogers*, 103 S. Ct. at 2144 nn.20 & 21) (R.S. § 3187, a statutory ancestor of § 6331, held not to give a Collector of Internal Revenue "authority, in that summary mode [distraint], to sell and convey the interest of one who was not a delinquent.").

III.

For the reasons given, and without expressing any view on the constitutional conclusions reached by the District Court, we hold that the summary judgment entered for the bank was proper. The government is free to pursue the taxpayer's interest in the bank account in question by bringing suit to foreclose its lien under Section 7403, joining as defendants the three co-owners of the account. It may also ask the District Court, when such suit is filed, to issue an appropriate order restraining the bank from allowing any withdrawals from the account, until the rights of the various parties have been determined.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

[Filed Dec. 16, 1982]

MEMORANDUM AND ORDER

Pending before the Court are the plaintiff's and defendant's cross-motions for summary judgment and the defendant's motion to dismiss. The facts of the case are these. The Secretary of the Treasury has due and owing from Roy Reeves an unpaid balance of $856.61 in income tax liabilities. On June 13, 1980, in order to collect the sum due, the government filed a notice of levy upon the accounts of Roy Reeves with the defendant, National Bank of Commerce (Bank). At that time the Bank had two separate accounts, one checking and the other savings, both in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." The combined balances in both accounts totaled $1,563.26. The government wants the Bank to surrender $856.61 of that amount, but the Bank refuses to do so.

The arguments made by both sides are straightforward. The government concedes that it can levy only upon that portion of the joint funds that belongs to Roy Reeves. Nevertheless, it contends that applicable law

imposes a presumption that all funds in such a joint bank account are prima facie the property of the taxpayer and, ergo, subject to levy, and, therefore, absent appearance and proof by each co-depositor of his or her actual ownership interest in the joint funds, the bank must turn over the funds in such accounts to the tax collector. Because there is no evidence in this record that any of the co-depositors other than Roy Reeves have some individual and separate ownership interest in the funds in the accounts, the government concludes that it is entitled to judgment as a matter of law. It further contends that the statutory defenses are inapplicable here and, furthermore, that the Bank cannot raise the ownership-interest defense of the third-party co-depositors because they are not parties to the present suit.

The Bank argues that before it can release any of the joint funds, the government must prove that Roy Reeves is the actual owner of the portion of the funds levied upon. In order to do this, the Bank contends, the government must join the co-depositors in this suit because they are indispensable parties for the resolution of the ownership issue. Since the co-depositors were not so joined, the Bank would have the Court dismiss the case.

The Internal Revenue Code, 26 U.S.C. §§ 6331 and 6332, permits the imposition of a levy in favor of the United States upon all "property and rights to property ... belonging to [the delinquent taxpayer]." Furthermore, section 6332 imposes an obligation on any person in possession of property subject to levy to surrender that property upon notice and demand, subject to certain defenses not relevant here.

It is equally clear, however, that property cannot be levied upon and required to be surrendered unless it is actually owned by the taxpayer. *Raffaele* v. *Granger*, 196 F.2d 620 (3d Cir. 1952) (refusing to allow levy upon

bank accounts of taxpayer-husband where accounts were held by husband and wife as tenants by the entirety); *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956) (holding distraint unavailable where property interests are unclear in the property levied upon). *Stuart* v. *Willis*, 244 F.2d 945 (9th Cir. 1957) (levy against property of joint venturers in order to satisfy tax liability of one venturer was void).

While the action for enforcement of the levy is properly within the jurisdiction of this Court, it must look to the law of the State of Arkansas to determine the ownership rights in a joint bank account. *Poe* v. *Seaborn*, 282 U.S. 101 (1930) (ownership of property for tax purposes is determined by state law). *See also United States* v. *Mitchell*, 403 U.S. 190 (1971) (upholding the rule as applied to the Internal Revenue Code of 1954).

The case on point is *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964), in which the Arkansas Supreme Court clarified the rules with respect to the ownership interests in a joint bank account subject to a garnishment proceeding. The rule laid down in that case is as follows:

> [T]he joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which parol evidence is admissible to show the respective contributions of each depositor, as well as any intent of one to make a gift to the other.

Hayden, 238 Ark. at 353, 381 S.W.2d at 753 (quoting from Note, *Garnishment*, 71 Harv. L. Rev. 557, 558 (1958)).

The Arkansas Supreme Court then set out the order and allocation of proof for a case where a joint bank account is garnished. First, the joint account is prima facie subject to garnishment, and the burden is on each joint depositor to show what portion of the funds in the

account he or she owns. Second, if not already joined, each joint depositor should be made party to the suit to afford him or her an opportunity to present evidence of ownership in the account. Third, the garnishment will then be allowed to the extent of the portion of the joint account that is owned by the debtor. *Id.* at 354, 383 S.W.2d at 754.

Other courts are in agreement that the government can levy against a joint bank account only to the extent of the delinquent taxpayer's ownership interest in the account. *See, e.g., Raffaele* v. *Granger, supra.*

The parties in this case agree that only the portion of the joint account owned by the delinquent taxpayer can be levied upon. And, both parties agree that the co-depositors of the joint account are entitled to make known their respective ownership interests in the joint account in order to insure that only that portion of the account belonging to the taxpayer is seized by way of levy. At this point, however, the parties part company and disagree as to the procedure by which the co-depositors should be notified and allowed to represent, and make proof of, their interests in such accounts.

What the Court is left with then is the fundamental issue in this case: by what procedure, if any, should the ownership interests of the co-depositors in a joint bank account be protected when the government levies upon the entire account to obtain the funds owned by only one co-depositor, the delinquent taxpayer?

In beginning its analysis, the Court is mindful of the distinction between cases involving levy where the ownership interest of the property in question is undisputed and those cases where multiple ownership interests are facially present. The point was well made in the case of *United States* v. *Stock Yards Bank of Louisville*, 231 F.2d at 631, where the court stated:

> It should be pointed out, however, that distraint is a rough and ready remedy. This short cut form

> of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. See United States v. Metropolitan Life Ins. Co., 2 Cir., 1942, 130 F.2d 149. Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.

Where a levied-against bank account is in the taxpayer's name only, it is reasonable that the bank should be required to comply immediately with the demand to surrender the funds. But in the case of a joint account, there is facial evidence of some co-ownership by others, although the actual extent of their undivided ownership interests is not usually known. Thus, the holding and reasoning of the Arkansas Supreme Court in the *Hayden* case makes [*sic*] practical as well as judicial sense.

In these joint account cases, the National Bank of Commerce would require the joinder of the co-depositors in any suit to enforce a levy. This argument presumes, of course, that every time a notice and demand for levy is brought against a joint bank account, the bank will automatically refuse to surrender the funds, thereby defeating the extra-judicial aspect of the levy procedure and forcing the government to bring a lawsuit for enforcement of the levy. The Bank would avoid assuming the burden of proving the ownership interests of the co-depositors in the joint account by requiring that the government name the co-depositors as co-defendants in the enforcement suit.

The government, on the other hand, would require the Bank to surrender the funds levied upon, relying on the presumption of ownership in the taxpayer set forth in *Hayden*. To protect the co-depositors, the government would neither notify them of the levy, name them as co-defendants in an enforcement suit, nor allow the bank to assert their ownership interests in its defense, but would have them pursue a post-seizure remedy of bringing suit against the government for the return of their proportionate interest in the levied-upon property under 26 U.S.C. § 7426.

This Court sees merit in both of the parties' arguments, but finds that neither side has offered the best legally acceptable solution to this important problem.

At the outset, the levy and distraint proceeding under the Code may involve two parts: (1) the notice and demand of levy, an extra-judicial proceeding, and (2) the enforcement of the levy when the demand is contested, a judicial proceeding. A case such as the one before the Court has already reached the judicial stage, yet the parties argue about the rules that ought to be applied at both stages. The real issue raised is: what should the rules be at the notice and demand stage of the administrative, levy proceeding so as to avoid coming to court altogether?

Pivotal to the resolution of this issue is the interest of the co-depositor in not having his ownership interest in the account erroneously taken by the government. To avoid this, some notice procedure at the levy stage is required. The nontaxpayer co-depositor has a right to some due process of law, which is something more than the post-seizure lawsuit allowed under Section 7426.

Due process is not a concept unrelated to the circumstances of a particular problem. It is a flexible concept which calls for such procedural protection as the particular situation demands. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). What is required under *Mathews* is a three-part analysis in order to determine what process is due. The first requirement is an assessment of the interests of the party whose property is at stake. In the joint bank account situation, there are at least two interested parties, excluding the taxpayer, whose rights are

fully protected by the initial process where it is determined that taxes are due, and by the redemption proceedings under 26 U.S.C. § 6337. There is the co-depositor who does not want his ownership interest in the joint account seized along with that of the taxpayer's. And there is the bank which has an interest in not being placed in the position of deciding who actually owns what portion of the account, thereby facing possible liability to the co-depositor whose ownership interest in the account is mistakenly seized.

The second requirement is an assessment of the government's interest. In this situation, it needs the extra-judicial levy and distraint procedure to be as free as possible from excessive procedural requirements in order to obtain swift and inexpensive collection of delinquent taxes. It also needs a device to "freeze" the account *eo instanti.*

The final requirement is the crux of the due process analysis: what additional procedures, if any, would increase the probability of insuring that no property interest of the co-depositor is taken while at the same time adding minimal burdens upon the government in lawfully seizing property for tax liabilities? Clearly, a full hearing at the levy stage of the procedure would unduly burden the government, although it would insure near perfect accuracy in determining the proper ownership interests in the joint bank account. This Court finds, however, that there is a less burdensome alternative, which it holds to be the minimum due process required in distraint actions against joint bank accounts.

The essential elements of due process are notice and an opportunity to be heard. Therefore, when the Secretary of the Treasury or his agent gives notice to a bank for levy and distraint upon a joint bank account, the bank must immediately freeze the assets of the account and notify the Secretary or his agent of the names of all

co-depositors to the account. The Secretary or his agent must then notify those co-depositors of the levy action, giving them a reasonable (even if brief) time period in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest in the joint account which they claim and the factual and legal basis for that claim. If there is no response from the co-depositors within the required time, the bank must relinquish the funds levied upon and the co-depositors' only remedy, if any, will be to bring a lawsuit for recovery under 26 U.S.C. § 7426. If, however, a response adequately stating a claim is made by one or more of the co-depositors, the Secretary or his agent must determine what portion, if any, of the account belongs to the taxpayer (i.e., is not contested), and the bank must surrender only that portion of the account. During this time, the government's interest will be protected by the freeze initially placed on the account.

If a good faith dispute develops over the ownership interests in the account, as evidenced by the affidavits or other information, the bank can refuse to surrender those funds in the account which are not clearly owned by the taxpayer, and the Secretary or his agent can then bring a suit to enforce the levy, as was done in the present case. At this point, however, due process would require that the government in its suit to enforce the levy name the co-depositors as co-defendants with the bank. The Court would allow the government the presumption that the entire account belongs to the taxpayer, and the codepositors, through either testimony or by affidavits or otherwise, would have to rebut the presumption in accord with *Hayden.* And it is noted, even in-court summary dispositions may be available depending upon the facts and circumstances.

Under this procedure, most levy and distraint demands on joint bank accounts probably will not require

in-court enforcement proceedings. If they do, the majority of them can probably be disposed of by summary judgment based on affidavits from the co-depositors. This procedure will put a minimal burden on the government, while serving to increase the likelihood that only the portion of a joint bank account belonging to the taxpayer is seized. Indeed, in the present state of affairs, the expense to the government is great when it wants to levy upon a joint bank account. The bank refuses to surrender the funds in fear for its own liability, and the government is forced to take the matter directly to court. If the government persuades the bank to surrender the funds, the co-depositors can force the government into court where the burden of proof is then on the government to show that all the funds seized were the property of the taxpayer. *See Flores* v. *United States*, 551 F.2d 1169 (9th Cir. 1977). Again, time and money are spent by the government, defeating the purpose of the distraint statute and diminishing the value of the tax monies ultimately collected.

Although case law on the narrow issue of proper due process protection for co-depositors to a levied-upon joint bank account is virtually nonexistent, there appears to be support for the procedure as outlined by this Court. In the *United States* v. *Stock Yards Bank of Louisville* case, which involved a levy upon jointly owned bonds held by the bank, the court required the government to bring an action to enforce a lien against the bonds and name the joint owners as co-defendants, rather than proceed against the bank by distraint. In the court's words:

> In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all parties fully protected.

This Court does not believe that all distraint actions against joint bank accounts automatically should be required to be converted into lien enforcement actions un-

der 26 U.S.C. § 7403, but the point of this case is well taken with respect to the need for protection of the co-depositors' interest.

In *United States* v. *New England Merchants National Bank*, 465 F. Supp. 83 (D. Mass 1979), a taxpayer's safe deposit box was levied upon and the bank refused to surrender it, contending that the ownership of the contents in the box was unknown. Although the court refused to require the joinder of the *taxpayer* in the enforcement suit, it did allow the bank to present the defense of ownership interests by possible third parties having an interest in the contents of the box. However, no evidence by the bank was offered (even by way of court-suggested affidavits) that other parties had an ownership interest in the contents of the box, and therefore summary judgment was granted to the government.

This Court finds the rationale of the district court of Massachusetts with respect to a safe deposit box and the defense of ownership by third parties to be relevant to cases involving joint bank accounts. The court stated:

> The ownership issue in a case involving seizure of contents of a safe deposit box is relatively simple, and the available evidence is limited. Moreover, because the United States possesses the key to the safe deposit box, the taxpayer is unable to purloin its contents. The need for rapid action, thus, is not as pronounced as in some other cases.

465 F.2d at 88.

Nevertheless, this Court takes the holding of the Massachusetts court a bit further by requiring the government to *either* notify the co-depositors of the levy on the joint account and give them an opportunity to present any claims of separate ownership interests during the administrative "levy" proceedings *or* join them as co-defendants with the bank in an enforcement action

on the levy, thereby insuring that a full and fair determination of the ownership interests in the joint account can be made. This minimal burden of notice and/or joinder more properly belongs on the government than the bank in a joint account case because the account itself presents prima facie evidence of ownership interests other than that of the taxpayer. Furthermore, the government is protected by the freeze on the funds in the joint account, and the ultimate evidence of ownership interests in the account is relatively easy to obtain, e.g., by affidavit. Finally, the government enjoys the presumption that the taxpayer owns all funds in the joint account.

Having set forth the due process requirements necessary in cases involving levy and distraint action upon joint bank accounts made pursuant to 26 U.S.C. §§ 6331 and 6332, the Court must now resolve the dispute before it.

The Court holds that the case must be dismissed in order to allow the government an opportunity to obtain the tax funds it seeks through the administrative, extra-judicial levy procedure as defined by section 6331 and in accord with the due process procedures as outlined in the opinion. What the Secretary or his agents must do then to obtain the funds sought from the joint bank account is to notify Ruby Reeves and Neva R. Reeves informing them that a levy of $856.61 has been made on the joint bank accounts to which they are co-depositors and that they have a certain (reasonable) time in which to notify both the designated government agent and the bank of any claim of an ownership interest in the joint account, the dollar amount of such claim, and the legal and factual basis therefor. If no response is made within the required time, the Bank must surrender the $856.61 to the government. If however, any adequate bona fide claim of separate ownership is made, the Bank need only surrender that

portion of the funds in the joint account that is uncontested, i.e., is in excess of the total amount of such other bona fide claims. If an ownership claim is without any stated factual or legal basis, the Bank must consider those funds as part of the account deemed owned by Roy Reeves and surrender them accordingly. If, however, the Bank believes that a genuine dispute exists as to the legality of any ownership claim made by Ruby or Neva Reeves, it may refuse to surrender any portion of the funds so claimed. At that point the government may bring suit to enforce the levy on the contested funds but must name as defendant(s) along with the Bank the co-depositor(s) actually claiming some ownership interest in the joint account.

It is therefore Ordered that the case be, and it is hereby, dismissed as premature in order to give the government an opportunity to obtain the tax funds sought pursuant to section 6331 and in some manner not inconsistent with this opinion.

Dated this 14th day of December, 1982.

/s/ Garnett Thomas Eisele
GARNETT THOMAS EISELE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1218EA

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

Appeal from the United States District Court
for the Eastern District of Arkansas

JUDGMENT

This appeal from the United States District Court for the Eastern District of Arkansas was submitted on the record of the said District Court and briefs of the parties.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

JANUARY 31, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1983

83-1218-EA.

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL BANK OF COMMERCE, APPELLEE.

Appeal from the United States District Court
for the Eastern District of Arkansas

The Court, having considered appellant's petition for rehearing with suggestion for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing with suggestion for rehearing en banc denied.

APRIL 30, 1984

APPENDIX E

Internal Revenue Code of 1954 (26 U.S.C.), as amended and as in effect for the years at issue:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to

property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * *

(c) *Enforcement of Levy.*—

(1) *Extent of personal liability.*—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at an annual rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) *Penalty for violation.*—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d) *Effect of Honoring Levy.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon

which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (c)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

* * * * *

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing apparel and school books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, provisions, furniture, and personal effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $1,500 in value;

(3) *Books and tools of a trade, business, or profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $1,000 in value.

(4) *Unemployment benefits.*—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) *Undelivered mail.*—Mail, addressed to any person, which has not been delivered to the addressee.

(6) *Certain annuity and pension payments.*—Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) *Workmen's compensation.*—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) *Judgments for support of minor children.*—If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) *Minimum exemption for wages, salary, and other income.*—Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

* * * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy

other than the property specifically made exempt by subsection (a).

* * * * *

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) or 6166A(h) shall be treated as a neglect to pay tax.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

SEC. 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) *Actions Permitted.*—

(1) *Wrongful levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

* * * * *

Ark. Stat. Ann. (1980):

67-521. *Deposits in two or more names.*—When a deposit shall have been made in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit and any additions thereto made by any of the persons named in the account, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

* * * * *

67-552. *Accounts and certificates of deposit in two or more names.*—Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:

* * * * *

(d) If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein

shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit].

* * * * *

(h) The person to whom such account or certificate of deposit is issued may pledge, withdraw or receive payment and any such payment made by the banking institution shall be a complete discharge as to the amount paid.

84-498 (8)

No. ________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA PETITIONER

VS.

NATIONAL BANK OF COMMERCE RESPONDENT

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
Attorneys for Respondent
Post Office Box 7808
Pine Bluff, AR 71611
Telephone No. (501) 534-5532

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT THE PETITIONER HAD FAILED TO ESTABLISH THAT RESPONDENT WAS IN POSSESSION OF "PROPERTY OR RIGHTS TO PROPERTY" BELONGING TO THE DELINQUENT TAX DEBTOR.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS INVOLVED

The Petition of the United States of America sets out the opinions below, the jurisdiction of this Court and the statutes involved (Petition pages 1 and 2, and Appendix to Petition pages 1a-38a). References to the opinions below will be directed to the Appendix to the Petition and will be cited as "App. pp. __". References to the Petition will be cited as "Pet. pp. ___".

COUNTER-STATEMENT OF THE CASE

A concise statement of the facts of the case and its procedural history appears in the opinions of the Courts below (App. pp. 1a-29a).

Petitioner accurately states (Pet. p. 4) ". . . the court concluded that the government had not shown the bank to be in possession of 'property [or] rights to property * * * belonging to 'Roy, as Section 6331(a) requires." However, Petitioner next states "[T]he court also found some force in the argument that 'the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy'". (Pet. p. 4). In fact, the Eighth Circuit stated only that "[I]t might be argued that the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy." (App. p. 7a). The Eighth Circuit then specifically found that the Arkansas Supreme Court had "rejected the view that a creditor of one co-owner is subrogated to that co-owner's

power to withdraw the entire account." (App. p. 7a).

Petitioner also states that the Court of Appeals concluded that the government could not prevail without negating or quantifying the claims that Ruby or Neva might have to the bank accounts in question. On the contrary, the Eighth Circuit simply found that the government bears the burden of establishing that the Respondent is in possession "property or rights to property" belonging to the tax debtor and failed to do so.

Finally, the Petitioner states that the Eighth Circuit appeared to agree with its contention that "a number of cases - probably the majority - either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a

Section 6331 levy." (Pet. p. 5). On the contrary, the Eighth Circuit specifically disagreed with the Petitioner's contention:

> "The government also contends that a number of cases - probably the majority - either or expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy. There are unquestionably such cases. We choose to follow Stock Yards Bank instead. (App. p. 11a).

The Eighth Circuit very thoroughly analyzed virtually all of the authority which Petitioner presents in its Petition and determined that only by following United States vs. Stock Yards Bank of Louisville, 231 F.2d 628 (6th Circuit, 1956) could it avoid direct conflict with the 6th Circuit and yet not be in conflict with any other Circuit.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO DIVISION OF AUTHORITY AMONG THE COURTS OF APPEALS WITH RESPECT TO THE ISSUE DECIDED BELOW.

The Eighth Circuit very carefully considered whether its decision might be in conflict with the decisions of this Court or the other Circuits. (See, App. pp. 11a-17a). The Eighth Circuit considered a possible conflict or accord of its decision with the Fifth Circuit decisions, United Sand & Gravel Contractors, Inc. vs. United States, 624 F.2d 733 (Fifth Circuit, 1980) and United States vs. Citizens and Southern National Bank, 538 F.2d 1101 (Fifth Circuit, 1976), the Sixth Circuit decision, United States vs. Stock Yards Bank of Louisville, 231 F.2d 628 (Sixth Circuit, 1956), the Tenth Circuit decision, Dieckmann vs. United States, 550 F.2d 622 (Tenth Cir-

cuit, 1977), and this Court's decision, United States vs. Rodgers, 103 S.Ct. 2132 (1983). The Eighth Circuit very clearly distinguished this case from the decisions of the Fifth and Tenth Circuits and determined that its decision would not be in conflict with those. The Court noted that, apparently, neither the Fifth nor Tenth Circuit considered Stock Yards Bank in their cases, but that none of their decisions conflict with it. (See, App. p. 13a)

In its analysis, the Eighth Circuit determined that its decision would be in complete accord with the decision of the Sixth Circuit in Stock Yards Bank and determined that it could not hold for the government without creating a direct conflict with the Sixth Circuit. In Stock Yards Bank, the Sixth Circuit had determined that the government has the burden of establishing the

extent, if any, of the taxpayer's property interest in property sought to be levied upon. Stock Yards Bank involved a levy on a bank having in its possession U. S. Savings Bonds held in joint names. The Sixth Circuit determined that even though the bond was held in joint names and either of the co-owners could present the bond for redemption, receive payment in full and thereby eliminate the other co-owner's interest in the bond, no definition of the tax debtor's property interest, if any, had been proven. Presentation by the government of proof of the tax debtor's property interest was found by the Sixth Circuit to be essential to its use of the levy procedure. The Eighth Circuit correctly determined that the same rule should be applied to the jointly held bank account in this case. As the Eighth Circuit noted, under Arkansas law, the property interest of a co-depositor in a jointly held bank account is not determined

by the facts that the account is held in joint names, either depositor may receive the entire proceeds of the account in full upon demand, and the co-depositor would have no right of action against the bank for honoring demand. See, Black vs. Black, 199 Ark. 609, 135 S.W.2d 837 (1940), and McGuire vs. Benton State Bank, 232 Ark. 1008, 342 S.W.2d 77 (1961). Thus, the Eighth Circuit's decision and that of the Sixth Circuit are indistinguishable. In both, the IRS was seeking to levy on jointly held property where no property interest or right to property of the tax debtor had been established under the applicable law. In both, the mere fact that the property was held in joint names did not legally bestow upon the tax debtor any right to property. The Eighth and Sixth Circuits are therefore in agreement, and their decisions do not conflict with the decisions of any other

Circuit.

The Eighth Circuit also correctly found support for this decision in the dictum of this Court in United States vs. Rodgers, 103 S.Ct. 2132 (1983), where this Court said:

> "Section 6331, unlike Section 7403 does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by Section 6331. Indeed, third parties whose property or interest in property have been seized inadvertently are entitled to claim that property has been 'wrongfully levied upon', and may apply for its return either through administrative channels, 26 U.S.C. §6343(b), or through a civil action filed in a federal district court, Section 7426(a) (1); see, Section 7426(b)(1), 7426(b) (2)(A).

Petitioner sets out numerous cases in its Petition which it asserts conflict with the decision below. In some of them was the issue simply whether the tax

debtor owned an interest in the property being levied upon. For the most part, the cases concerned whether a bank's right of set-off is paramount to an IRS levy and did not question the tax debtor's interest in the account. None seem to involve a question of whose money was in the account being levied upon and, in fact, most of the cases do not even involve joint bank accounts. Further, none concern Arkansas law which is determinative of the tax debtor's property interest in this case.

II.

THE COURT BELOW CORRECTLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH, UNDER ARKANSAS LAW, THAT THE JOINT BANK ACCOUNTS WERE PROPERTY OR RIGHTS TO PROPERTY BELONGING TO THE TAX DEBTOR.

Despite the myriad of other arguments made by the Petitioner, this case is determined simply by considering whether the

Petitioner has proven Respondent to be in possession of property or rights to property belonging to the tax debtor.

Petitioner agrees that State law controls in determining the nature of the legal interest the taxpayer has in property. (Pet. p. 9). In fact, it is without dispute that this is correct. See, Aquilino vs. United States, 363 U.S. 509 (1960). There is also no doubt that the IRS can lawfully levy only on property or rights to property belonging to the tax debtor. See, 26 U.S.C. §§6321 and 6331(a). Before a third party can be liable to the IRS for refusing to honor an IRS levy, it must be in possession of property or rights to property belonging to the tax debtor. See, 26 U.S.C. §6332(a). Therefore, before Petitioner can prevail against Respondent for its refusal to honor the levy, Petitioner must prove Respondent

was in possession of property or rights to property belonging to the tax debtor. Petitioner has simply failed to provide such proof and therefore cannot prevail in this action.

Petitioner contends that because Respondent holds two bank accounts in the joint names of the tax debtor and two other persons, that it holds property or rights to property belonging to the tax debtor. This is simply not the case under Arkansas law.

Petitioner correctly argues that "[U]nder Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts, without notice to his co-depositors, for his own exclusive benefit. The bank for its part was obligated to honor any withdrawal requests Roy might make, again up to the full value of the accounts."

Pet. pp. 9-10). However, Roy would have these rights only under Arkansas banking law, and not under Arkansas property law. As Petitioner notes on page 10 of its Petition, the relevant Arkansas statutes are Ark. Stat. Ann. §67-521 (1980) and Ark. Stat. Ann. §67-552 (1980), amended by Act No. 843 of 1983, Section 1. Those statutes set out the rules for banks to follow in dealing with accounts held in joint names, but were passed for the protection of the bank and not for determining property rights. As the Eighth Circuit noted in its opinion (App. p. 6a):

> "Black vs. Black, 199 Ark. 609, 135 S.W.2d 837 (1940), holds that the statute was
>
> > passed for the protection of the bank in which the deposit was made. . . .The statute effects no investiture of title as between the depositors themselves, but only relieves the

> bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved.

199 Ark. at 617, 135 S.W.2d at 841. Accord, McGuire vs. Benton State Bank, 232 Ark. 1008, 1012, 342 S.W.2d 77, 79 (1961)."

It is therefore without dispute that under Arkansas law, no property right or interest is defined simply by the establishment of a joint bank account.

Petitioner has argued that because the tax debtor could withdraw the sums from the bank account a right to property exists belonging to him. It should be noted that even if such a "right to property" belongs to Roy, such a right is only in his possession and not in possession of the Respondent. The

levy of the IRS reaches only property or rights in possession of the person upon which the levy is served. See, 26 U.S.C. §6332(a). Since Respondent is not in possession of this right to withdraw, even if it is a "right to property", it holds nothing to be levied upon.

In any event, in Arkansas, the right to make such a withdrawal is not a right which can be exercised by a creditor of one of the depositors.

> "In Hayden vs. Gardner, 238 Ark. 351, 381 S.W.2d 752 (1964), the Supreme Court specifically rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account. Instead, a creditor must joint both co-owners as defendants, and the co-owner who is not the debtor may show by parole or otherwise the extent of his or her interest in the account. Only that portion of the account so shown to belong to the nondebtor co-owner may be reached by the other co-owner's creditor on a garnishment.
> (App. p. 7a)

The Eighth Circuit has therefore accurately concluded that, under Arkansas law, Petitioner has not proved these joint bank accounts to be property or a right to property belonging to the tax debtor. Having not met this threshhold burden, Petitioner cannot prevail.

CONCLUSION

For these reasons, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Terry F. Wynne
BRIDGES, YOUNG, MATTHEWS, HOLMES & DRAKE
315 East Eighth Avenue
Post Office Box 7808
Pine Bluff, AR 71611
Telephone: (501) 534-5532

By Terry F. Wynne
Attorneys for Respondent

(3)

No. 84-498

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11 PF

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-498

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. In our petition (at 15-16), we showed that the decision below conflicts with decisions of the Second, Fifth, and Ninth Circuits, each of which has held that a taxpayer's unrestricted right under state law to withdraw funds from a bank account constitutes "property [or] rights to property" within the meaning of Section 6331 of the Internal Revenue Code.[1] Those courts reasoned, in direct conflict with the Eighth Circuit here, that a depositor's right of withdrawal is a "right to property" on which the IRS may levy, regardless of the fact that there may exist other, competing claims to the funds on deposit and that the question of ultimate ownership may thus be unresolved.

Respondent makes no serious effort to disprove the existence of a circuit conflict on this question. It notes (Br. in Opp. 9-10), as we noted in our petition (at 16 n.10), that

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

most of the decisions we cite involved situations in which the potentially competing claim to the funds on deposit was the bank's unexercised right of set-off, rather than (as here) a co-depositor's unexercised right of withdrawal. This factual difference, however, is irrelevant to the legal question we ask the Court to review. That question is whether a delinquent taxpayer's rights vis-a-vis the bank under state law — *i.e.*, his unrestricted right to draw down the full outstanding balance in the account — constitutes "property [or] rights to property" within the meaning of Section 6331. The cited decisions and the decision below are in direct conflict on this question, although the question has arisen in factual contexts that involve immaterial differences in the identities of the potentially competing claimants and the nature of their claims.

2. In our petition (at 19-23), we contended that this case presents a question of considerable importance to the federal system of tax collection and hence would merit this Court's review even absent a circuit conflict. Practically speaking, we noted, the decision below will make IRS administrative levies impossible whenever a taxpayer's property is titled in joint names — a staggering result when one considers that the IRS serves levies on several hundred thousand joint bank accounts (not to mention other forms of jointly-held property) every year. The IRS would be forced by the decision below to go to court whenever it seeks to collect delinquent taxes from jointly-owned property, effectively depriving the Commissioner of the nonjudicial remedy that Congress provided by enacting the administrative levy provisions of the Code, while at the same time imposing an incalculable burden of litigation on the government and the federal district courts. Respondent does not dispute — indeed, does not even address — any of these considerations.

3. Respondent concedes (Br. in Opp. 12) that "Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts, without notice to his co-depositors, for his own exclusive benefit," and that the bank for its part "was obligated to honor any withdrawal requests Roy might make, again up to the full value of the accounts." Respondent asserts, however, that "Roy would have these rights only under Arkansas *banking* law, and not under Arkansas *property* law" (*id.* at 13 (emphasis in original)). In speaking of "Arkansas property law," respondent evidently means Arkansas garnishment law (see *id.* at 2-3, 15), under which a co-depositor's right to withdraw the funds in a joint bank account "is not a right which can be exercised by a creditor of one of the depositors" (*id.* at 15). Rather, a creditor in an Arkansas garnishment proceeding must file a state-court action joining all co-depositors and permit the latter to show "by parole or otherwise the extent of [their] interest in the account" (*ibid.* (original quotation marks omitted)). From this premise, respondent concludes that Roy's right to make unrestricted withdrawals is not a "right to property" within the meaning of Section 6331.

As noted in our petition (at 13-14), this argument, which also underpinned the decision below, reflects a serious misunderstanding of the role properly played by state law in resolving federal tax questions of the sort involved here. This Court has repeatedly held that state law is relevant only in "determining the *nature of the legal interest* which the taxpayer ha[s] in the property * * * sought to be reached" by the federal taxing statute. *Aquilino* v. *United States*, 363 U.S. 509, 513 (1960) (emphasis added). Once the nature of the taxpayer's legal interest is defined, the question whether that interest constitutes "property [or] rights to property," as those terms are used in Section 6331(a), is a question of federal law. *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1105 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977).

That was the basis of this Court's decision in *United States* v. *Bess*, 357 U.S. 51, 56 (1958), where it was held that a delinquent taxpayer's interest in the cash surrender value of a life insurance policy is "property [or] rights to property" to which a federal tax lien may attach.[2] The dispositive fact in the Court's view was that the taxpayer had "the right under the policy contract to compel the insurer to pay him this sum" and thus possessed "a chose in action * * * which he could have collected from the insurance companies in accordance with the terms of the policies" (*id.* at 56 (original quotation marks omitted)). The Court deemed it irrelevant that "under state law the insured's property right represented by the cash surrender value [was] not subject to creditors' liens," reasoning that, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the Internal Revenue Code], state law is inoperative" (*id.* at 56-57).

Here, as in *Bess*, Roy had the right under state law and his contract with the bank to compel it to pay him the full outstanding balance in the joint checking and savings accounts, and he thus possessed a chose in action which he could have collected from the bank in accordance with the terms of those accounts. That right belonging to Roy is a "right to property" within the meaning of Section 6331. It is irrelevant under *Bess* that Roy's creditors in an Arkansas garnishment proceeding could not have exercised his right of withdrawal in their favor. As a matter of federal law, the IRS in an administrative levy proceeding "steps into the taxpayer's shoes" and acquires whatever rights the taxpayer himself possesses. See *United States* v. *Rodgers*, No.

[2] As noted in our petition (at 6-7), the formula set forth in the Code for attachment of federal tax liens (I.R.C. § 6321) and for exercise of the Commissioner's power of administrative levy (I.R.C. § 6331(a)) is the same. In each case, the IRS may reach "all property and rights to property * * * belonging to" the delinquent taxpayer.

81-1476 (May 31, 1983), slip op. 12 n.16 (quoting 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* para. 111.5.4, at 111-102 (1981)). Since Roy possessed the unqualified right to withdraw the outstanding balance and use it to pay his taxes, the IRS sought, by virtue of the levy, to do on his behalf only what he could have done of his own volition. Roy's right of withdrawal was thus a "right to property" on which the IRS could levy and Arkansas garnishment law "is inoperative" (*Bess*, 357 U.S. at 57) to alter that outcome.

4. Respondent contends that, even if Roy's right of withdrawal constituted a "right to property," it would still not be required to honor the levy because "such a right is only in [Roy's] possession and not in possession of the [bank]" (Br. in Opp. 14). On respondent's view, "[t]he levy of the IRS reaches only property or rights in possession of the person upon which the levy is served" (*id.* at 14-15). Since it "is not in possession of this right to withdraw," the bank says, "it holds nothing to be levied upon" (*ibid.*).

This argument is frivolous. Section 6332(a) provides, with exceptions not relevant here, that "any person in possession of (*or obligated with respect to*) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (*or discharge such obligation*) to the Secretary" (emphasis added). Respondent was obviously "obligated with respect to" Roy's rights to property because, as it concedes (Br. in Opp. 12), it "was obligated to honor any withdrawal requests Roy might make." If respondent's view were correct, the IRS would be precluded from serving notices of levy upon banks with respect to depositors' accounts under any circumstances. But levies on bank accounts have been permitted since 1924, and the Treasury Regulations explicitly authorize the IRS to serve notices of levy "on any person in possession of, or obligated with respect to, property or rights to property * * * including

* * * bank accounts." Treas. Reg. § 301.6331-1(a)(1). Indeed, as noted in our petition (at 19 n.13), the IRS serves about 500,000 notices of levy on banks annually.

5. Respondent errs in seeking support for its position from this Court's decision in *United States* v. *Rodgers*, No. 81-1476 (May 31, 1983). That case involved the interpretation of Section 7403(a), which authorizes the IRS to bring a plenary judicial action to foreclose its tax lien and subject "any property * * * of the delinquent, or in which he has any right, title, or interest, to the payment of [the] tax." The question in *Rodgers* was whether Section 7403 empowers a district court to order the sale of a family home in which the delinquent taxpayer has an interest, but in which the taxpayer's nondelinquent spouse also has a homestead interest under state law. This Court held that sale of the entire property, and not merely of the delinquent taxpayer's interest in the property, is permitted, provided that the nondelinquent spouse is compensated out of the sale proceeds for his or her homestead interest in full. Slip op. 12, 19-21.

In reaching that result, the Court compared Section 7403's operation with that of Section 6331, which permits the IRS to levy on "property and rights to property * * * belonging to" the delinquent taxpayer. The Court noted that "Section 6331, unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331" (slip op. 17). The Court observed that "third parties whose property or interests in property have been seized inadvertently" by IRS levy may apply for return of that property either through administrative channels or through a wrongful levy action in federal district court. Slip op. 17, citing I.R.C. §§ 6343(b) and 7426. See Pet. 13-14.

The court of appeals below read this passage from *Rodgers* to "impl[y] that levy is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties" (Pet. App. 17a). Contrary to the Eighth Circuit's reading, which respondent adopts (Br. in Opp. 9), the *Rodgers*' opinion contains no such implication. The *Rodgers*' Court correctly pointed out that Section 6331 does not "implicate the rights of third parties" because, as noted in our petition (at 15, 17-18, 19), an administrative levy, unlike a judicial lien-foreclosure action, does not determine ultimate ownership rights where such rights are in dispute. Rather, Congress has provided that third parties' competing claims to the property levied upon will be resolved *after* the levy is made, in a post-seizure administrative or judicial hearing. See *Rodgers*, slip op. 17, citing I.R.C. §§ 6343(b) and 7426. In *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977), this Court specifically upheld the validity of an IRS levy on property bearing on its face the name of a third party — a straw man found to be the delinquent taxpayer's alter ego (see 429 U.S. at 350-351). And, as noted in our petition (at 17 n.11), the lower courts have regularly done the same. Nothing in *Rodgers* suggests that this Court would invalidate an IRS levy on a jointly-titled bank account where (as here) the taxpayer has the unrestricted right to obtain possession of the full outstanding balance at any time without notice to his co-depositors.

For these reasons and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1984

(4)

No. 84-498

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

TERRY F. WYNNE, ESQUIRE
Bridges, Young, Matthews, Holmes & Drake
315 East Eighth Avenue
P.O. Box 7808
Pine Bluff, Arkansas 71611
(501) 534-5532
Counsel for Respondent

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 27, 1984
CERTIORARI GRANTED JANUARY 7, 1985

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*The opinion and judgment of the court of appeals, and the memorandum of the district court, are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKASAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

RELEVANT DOCKET ENTRIES

9/28/81	COMPLAINT—summons issued in L.R., handed atty for service.
10/16/81	ANSWER
11/6/81	AFFIDAVIT of Service of summons exec on deft. 9/29/81.
8/13/82	STIPULATION of Facts by Parties.
"	STIPULATION to Amend Complaint to Dismiss w/o prejudice Count II.
"	AMENDED COMPLAINT.
"	ANSWER to Amended Complaint.
11/3/82	SUPPLEMENT to Stipulation of Facts by parties.
11/19/82	MOTION for S/J by Deft. (*12/16/82*)
"	BRIEF in Support of Motion for S/J
"	MOTION to Dismiss by Deft. (*12/16/82*)
"	BRIEF in Support of Motion to Dismiss.
11/26/82	MOTION for S/J by Pltf. (*12/16/82*)
"	MEMORANDUM in Support of Motion.
12/13/82	RESPONSE to Pltfs Motion for S/J by Deft.
"	MEMORANDUM in Opposition to Deft's Motion to Dismiss and to Deft's Motion for S/J by Pltf.

12/16/82	MEMORANDUM & ORDER (Eisele) that the case is dismissed as premature in order the Gov. an opportunity to obtain the tax funds sought pursuant to § 6331 and in some manner not inconsistent with this opinion. EOD 12/16/82.
"	JUDGMENT (Eisele) pursuant to Memo & Order, case is dismissed. EOD 12/16/82.
2/9/83	NOTICE of Appeal by Pltf.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1218

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL BANK OF COMMERCE, APPELLEE

RELEVANT DOCKET ENTRIES

1983		
Feb. 15	Docketed Case	
" "	Certified copies of notice of appeal docket entries; judgment and memorandum & order rec'd from District Court.	(1)
" "	TO SETTLEMENT CONFERENCE	
Feb. 15	BRIEFING SCHEDULE: Aplnt DR 2/25/83; Aplee DR 3/7/83; Clerk's Record 3/28/83; OR appndx 3/28/83; Transcript 3/17/83; Brf. Aplnt 3/28/83; Brf. Aplee 4/27/83.	
Feb. 25	APPEARANCE for appellee.	(2)
Feb. 28	APPEARANCE for appellant	(3)
Feb. 28	Received appellant's designation of record.	
Mar. 28	MOTION aplnt ext of time to file brf.—ORDER: Motion granted to April 4, 1983, on 3/29/83w.	(4)mm
Apr. 18	BRIEF APPELLANT: w/ser 4/14 7 copies w/appendix	(5)cj
Apr. 18	APPEARANCE for appellants	(6)
May 16	MOTION APLEE ext of time to file brf—ORDER: Motion granted to June 1, 1983, on May 16, 1983.w.	(7)mm
June 2	BRIEF Appellee w/ser. 6/1 7 copies.	(8)rh
June 3	TO SCREENING w. 20 min.	
June 23	REPLY BRF APLNT w/ser 7 copies	(9)mm
Jul 26	Transferred to September session.	

Sept 15	ARGUED AND SUBMITTED IN ST. LOUIS to Judges Bright, Arnold, and Fagg. Mr. John Dudeck, Jr. (Justice Dept) for appellant; Mr. Terry F. Wynne for appellee. Rebuttal by Mr. Dudeck, Jr. Recorded.
Sept. 26	RECEIVED additional authority from Govt. per Court's request. (to court) (10)
1984	
Jan. 4	Received additional citations from counsel for appellant. (to court)
Jan. 31	OPINION by Arnold PUBLISHED (11)m
Jan. 31	JUDGMENT: Judgment of Dist. Ct. affirmed in accordance with opinion (12)
Feb. 13	APPELLANT'S MOTION for extension of time for filing petition for rehearing with suggestion for rehearing en banc w/service. (13)
Feb. 24	ORDER: Motion appellant for ext. of time to file petition for rehearing or rehearing en banc is granted to and including 3/15/84. (14)
Mar. 15	PETITION APPELLANT FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC. w/service. (15)
Apr. 30	ORDER: The Court, having considered appellant's petition for rehearing with suggestion for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing with suggestion for rehearing en banc denied. (16)
May 11	MANDATE ISSUED.
May 16	RECEIPT FOR MANDATE. (17)
July 30	LETTER indicating that extension of time to file petition for writ of certiorari was granted to and including September 27, 1984. (18)cg
Oct. 15	NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 84-498, dated September 27, 1984. (19)cg

1985	
Jan. 10	CERTIFIED COPY OF ORDER of Supreme Court granting certiorari in Case No. 84-498, dated January 7, 1985. (20)cg

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

COMPLAINT

The United States of America, by and through its attorney, George W. Proctor, United States Attorney for the Eastern District of Arkansas, complains of the defendant as follows:

1. This is a civil action arising under the internal revenue laws and brought by the United States of America pursuant to Sections 7402 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C.) and Sections 1340 and 1345 of Title 28, United States Code.

2. This action is authorized and sanctioned by the Chief Counsel, Internal Revenue Service, the duly authorized delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States, pursuant to Section 7401 of the Internal Revenue Code.

3. The defendant, National Bank of Commerce, is an Arkansas corporation with its principal place of business at 120 West 5th Street, Pine Bluff, Arkansas, and is within the jurisdiction of this Court.

COUNT I

4. On December 10, 1979 a delegate of the Secretary of the Treasury assessed against Roy J. Reeves income taxes, penalties and interest for the year 1977 in the total amount of $3,607.45. As the result of payments and credits, there is presently due and owing on these assessments an unpaid balance of $856.61.

5. As of June 13, 1980 there was on deposit with the defendant the sum of $321.66 in a checking account styled in the name of "Roy or Ruby or Neva R. Reeves." On the same date there was also on deposit with the defendant the sum of $1,241.60 in a savings account styled in the name of "Roy or Ruby or Neva R. Reeves."

6. On June 13, 1980 a Notice of Levy was served on the defendant pursuant to Section 6331 of the Internal Revenue Code demanding that the defendant pay over to the United States all sums which the defendant owed to Roy J. Reeves up to a total of $1,302.56. On June 26, 1980 a partial release of levy was issued for monies in excess of $856.61, and on October 10, 1980 a Final Demand was served on the defendant notifying it of its obligation under the Internal Revenue Code to pay over to the United States monies owed to Roy J. Reeves.

7. The defendant has refused to pay over to the United States the monies which were levied upon and such refusal continues to the present day.

8. Pursuant to Section 6332(c) of the Internal Revenue Code the defendant is liable to the United States in the amount of $856.61 plus a penalty of $428.30 for its refusal to surrender the property levied upon.

COUNT II

9. On May 19, 1980 a delegate of the Secretary of the Treasury assessed against Charlie M. Henderson income taxes, penalties and interest for the year 1979 in the total amount of $2,449.51. As the result of payments and credits, there is presently due and owing on these assessments an unpaid balance of $1,031.51.

10. As of October 3, 1980 there was on deposit with the defendant the sum of $281.20 in a checking account styled in the name of "Charlie Mae Henderson or (illegible)."

11. On October 3, 1980 a Notice of Levy was served on the defendant pursuant to Section 6331 of the Internal Revenue Code demanding that the defendant pay over to the United States all sums which the defendant owed to Charlie M. Henderson up to a total of $1,095.99. On October 10, 1980 a Final Demand was served on the defendant notifying

it of its obligation under the Internal Revenue Code to pay over to the United States monies owed to Charlie M. Henderson.

12. The defendant has refused to pay over to the United States the monies which were levied upon and such refusal continues to the present day.

13. Pursuant to Section 6332(c) of the Internal Revenue Code the defendant is liable to the United States in the amount of $281.20 plus a penalty of $140.60 for its refusal to surrender the property levied upon.

WHEREFORE, the plaintiff United States of America prays for judgment against the defendant in the amount of $1,706.71 plus interest thereon according to law, for its costs, and for such other and further relief as this Court deems just and proper.

GEORGE W. PROCTOR
United States Attorney

By: ______________________

LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

ANSWER

Comes the defendant, National Bank of Commerce of Pine Bluff, and for its Answer to the Complaint filed herein states:

1. Paragraph 1 of the Complaint states conclusions of law and does not require an admission or denial.

2. The defendant is without knowledge concerning the allegations of paragraph 2 of the Complaint and therefore denies same.

3. The allegations of paragraph 3 of the Complaint are admitted.

4. Defendant is without knowledge concerning the allegations of paragraph 4 of the Complaint and therefore denies same.

5. Defendant admits that as of June 13, 1980, it had a checking account and a savings account in the names of Roy Reeves or Ruby Reeves or Neva R. Reeves with a total balance in the two accounts in excess of $856.61. Any one of said parties was authorized to make withdrawals. Defendant does not know which of said parties was the owner of the funds in said accounts.

6. The allegations of paragraph 6 of the Complaint are admitted.

7. The allegations of paragraph 7 of the Complaint are admitted.

8. Defendant denies the allegations of paragraph 8 of the Complaint.

9. Defendant is without knowledge concerning the allegations of paragraph 9 of the Complaint and therefore denies same.

10. As of October 3, 1980, there was on deposit with the defendant checking account 511-210-9 with a balance of $281.20 in the name of Charlie Mae Henderson or Linda M. Shovan, 2600 North Hutchinson Street, Pine Bluff, Arkansas. Either of said parties was authorized to make withdrawals from said account. Defendant does not know whether the funds in this account belonged to Charlie Mae Henderson or to Linda M. Shovan, or partly to one of said parties and partly to the other.

11. The allegations of paragraph 11 of the Complaint are admitted.

12. The allegations of paragraph 12 of the Complaint are admitted.

13. The allegations of paragraph 13 of the Complaint are denied.

14. Defendant denies each and every material allegation of the Complaint not hereinabove specifically admitted.

15. Defendant reserves the right to file amended, modified, supplemental and additional pleadings herein following additional investigation of matters alleged in the Complaint.

WHEREFORE, defendant prays that the Complaint filed herein be dismissed at the cost of the plaintiff and for all other proper relief.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
Post Office Box 7808
Pine Bluff, Arkansas 71611

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

STIPULATION OF FACTS

The parties hereto, by and through their respective counsel, stipulate and agree that the following facts, conclusions of law and other matters contained herein are true:

1. This is a civil action arising under the internal revenue laws and this Court has jurisdiction of the matter pursuant to Sections 7402 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 1340 and 1345 of Title 28, United States Code.

2. This action is authorized and sanctioned by the Chief Counsel, Internal Revenue Service, the duly authorized delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States, pursuant to Section 7401 of the Internal Revenue Code.

3. The defendant, National Bank of Commerce, is an Arkansas corporation with its principal place of business at 120 West 5th Street, Pine Bluff, Arkansas, and is within the jurisdiction of this Court.

4. On December 10, 1979 a delegate of the Secretary of the Treasury assessed against Roy J. Reeves income taxes, penalties and interest for the year 1977 in the total amount of $3,607.45. As the result of payments and credits, there is presently due and owing on these assessments an unpaid balance of $856.61.

5. As of June 13, 1980 there was on deposit with the defendant the sum of $321.66 in a checking account styled in the name of "Roy Reeves or Ruby Reeves or Neva R.

Reeves." On the same date there was also on deposit with the defendant the sum of $1,241.60 in a savings account styled in the name of "Roy Reeves or Ruby Reeves or Neva R. Reeves."

6. Any one of the three parties, Roy Reeves, Ruby Reeves or Neva R. Reeves, was authorized to make withdrawals from the above accounts. The defendant does not know which of the three parties was the owner of the funds prior to their deposit in the accounts.

7. On June 13, 1980 a Notice of Levy was served on the defendant pursuant to Section 6331 of the Internal Revenue Code demanding that the defendant pay over to the United States all sums which the defendant owed to Roy J. Reeves up to a total of $1,302.56. On June 26, 1980 a partial release of levy was issued for monies in excess of $856.61, and on October 10, 1980 a Final Demand was served on the defendant notifying it of its obligation under the Internal Revenue Code to pay over to the United States monies owed to Roy J. Reeves.

8. The defendant has refused to pay over to the United States the monies which were levied upon and such refusal continues to the present day.

George W. Proctor
United States Attorney

By: ______________________
Lawrence Sherlock
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Attorney for Plaintiff

By: ______________________
Terry F. Wynne
Bridges, Young, Matthew, Holmes and Drake
P.O. Box 7808
Pine Bluff, Arkansas 71611
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS PINE BLUFF DIVISION

No. PB-C-81-340

United States of America, plaintiff

v.

National Bank of Commerce, defendant

STIPULATION TO AMEND COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the parties to this action hereby stipulate that the Complaint be amended in the following respects:

1. Count II of the original Complaint shall be dismissed without prejudice;

2. The plaintiff shall waive any claim to the penalty provided by Section 6332(c)(2) of the Internal Revenue Code. Accordingly, the parties stipulate that the Amended Complaint attached hereto be filed with the Court.

George W. Proctor
United States Attorney

By: ______________________
Lawrence Sherlock
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Attorney for Plaintiff

____
Terry F. Wynne
Bridges, Young, Matthew, Holmes and Drake
P.O. Box 7808
Pine Bluff, Arkansas 71611
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

AMENDED COMPLAINT

The United States of America, by and through its attorney, George W. Proctor, United States Attorney for the Eastern District of Arkansas, complains of the defendant as follows:

1. This is a civil action arising under the internal revenue laws and brought by the United States of America pursuant to Sections 7402 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C.) and Sections 1340 and 1345 of Title 28, United States Code.

2. This action is authorized and sanctioned by the Chief Counsel, Internal Revenue Service, the duly authorized delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States, pursuant to Section 7401 of the Internal Revenue Code.

3. The defendant, National Bank of Commerce, is an Arkansas corporation with its principal place of business at 120 West 5th Street, Pine Bluff, Arkansas, and is within the jurisdiction of this Court.

4. On December 10, 1979 a delegate of the Secretary of the Treasury assessed against Roy J. Reeves income taxes, penalties and interest for the year 1977 in the total amount of $3,607.45. As the result of payments and credits, there is presently due and owing on these assessments an unpaid balance of $856.61.

5. As of June 13, 1980 there was on deposit with the defendant the sum of $321.66 in a checking account styled in

the name of "Roy Reeves or Ruby Reeves or Neva R. Reeves." On the same date there was also on deposit with the defendant the sum of $1,241.60 in a savings account styled in the name of "Roy Reeves or Ruby Reeves or Neva R. Reeves."

6. On June 13, 1980 a Notice of Levy was served on the defendant pursuant to Section 6331 of the Internal Revenue Code demanding that the defendant pay over to the United States all sums which the defendant owed to Roy J. Reeves up to a total of $1,302.56. On June 25, 1980 a partial release of levy was issued for monies in excess of $856.61, and on October 10, 1980 a Final Demand was served on the defendant notifying it of its obligation under the Internal Revenue Code to pay over to the United States monies owed to Roy J. Reeves.

7. The defendant has refused to pay over to the United States the monies which were levied upon and such refusal continues to the present day.

8. Pursuant to Section 6332(c) of the Internal Revenue Code the defendant is liable to the United States in the amount of $856.61 for its refusal to surrender the property levied upon.

WHEREFORE, the plaintiff United States of America prays for judgment against the defendant in the amount of $856.61 plus interest thereon according to law, for its costs, and for such other and further relief as this Court deems just and proper.

GEORGE W. PROCTOR
United States Attorney

By: ____________________
LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

ANSWER TO AMENDED COMPLAINT

Comes the Defendant, National Bank of Commerce of Pine Bluff, by its attorneys, Bridges, Young, Matthews, Holmes & Drake, and for its Answer to the Amended Complaint, states:

1. That it admits the allegations of paragraphs 1 through 7 of Plaintiff's Amended Complaint, but generally and specifically denies each and every other allegation of said Complaint.

WHEREFORE, the Defendant, National Bank of Commerce of Pine Bluff, prays that the Complaint and Amended Complaint filed herein be denied and dismissed and that Plaintiff take nothing thereby; for its costs herein and all other proper and legal relief.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611

By: ______________________
TERRY F. WYNNE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

SUPPLEMENT TO STIPULATION OF FACTS

In addition to the matters previously stipulated, the parties hereto, by and through their respective counsel, stipulate and agree as follows:

1. No further evidence as to the ownership of the monies in the subject bank accounts will be submitted.

GEORGE W. PROCTOR
United States Attorney

By: ______________________
LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Attorney for Plaintiff

____
TERRY F. WYNNE
BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

ANSWER TO AMENDED COMPLAINT

Comes the Defendant, National Bank of Commerce of Pine Bluff, by its attorneys, Bridges, Young, Matthews, Holmes & Drake, and for its Answer to the Amended Complaint, states:

1. That it admits the allegations of paragraphs 1 through 7 of Plaintiff's Amended Complaint, but generally and specifically denies each and every other allegation of said Complaint.

WHEREFORE, the Defendant, National Bank of Commerce of Pine Bluff, prays that the Complaint and Amended Complaint filed herein be denied and dismissed and that Plaintiff take nothing thereby; for its costs herein and all other proper and legal relief.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611

By: ____________________
TERRY F. WYNNE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF ARKANSAS
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SUPPLEMENT TO STIPULATION OF FACTS

In addition to the matters previously stipulated, the parties hereto, by and through their respective counsel, stipulate and agree as follows:

1. No further evidence as to the ownership of the monies in the subject bank accounts will be submitted.

GEORGE W. PROCTOR
United States Attorney

By: ____________________
LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Attorney for Plaintiff

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TERRY F. WYNNE
BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

DEFENDANT'S MOTION TO DISMISS

Comes the Defendant, National Bank of Commerce of Pine Bluff, by its attorneys, Bridges, Young, Matthews, Holmes & Drake, and for its Motion to Dismiss pursuant to Rule 19 of the Federal Rules of Civil Procedure states:

1. That Rule 19 of the Federal Rules of Civil Procedure requires a party to be joined if a final Decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final termination may be wholly inconsistent with equity and good conscience.

2. The interest of a co-depositor in a joint bank account is an interest which requires the co-depositors to be joined to afford complete relief in this action and makes those persons indispensible to this action.

3. Said joint depositors have not been joined in this action and it must therefore be dismissed.

WHEREFORE, Defendant, National Bank of Commerce of Pine Bluff, prays that this Motion to Dismiss be granted and that this case be dismissed; for its costs expended; and for all reasonable attorneys' fees.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611

By: ______________________
TERRY F. WYNNE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes the Defendant, National Bank of Commerce of Pine Bluff, by its attorneys, Bridges, Young, Matthews, Holmes & Drake, and for its Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, states:

1. That pursuant to Stipulations, Amended Complaint and Answer to Amended Complaint filed herein, there exists no genuine issues as to any material fact and the Defendant is entitled to judgment in its favor as a matter of law.

2. The Plaintiff seeks judgment against the Defendant in the amount of $856.61 based on a levy made by the Plaintiff on a joint bank account in the names of Roy Reeves, Ruby Reeves and Neva R. Reeves in the possession of the Defendant.

3. Defendant refused to turn over money in the joint account of Roy Reeves, Ruby Reeves and Neva R. Reeves, because Plaintiff has failed to provide proof of the actual ownership interest of Roy Reeves and the sums on deposit with it. Plaintiff has also stipulated that no further proof of ownership of the monies contained in the accounts will be presented.

4. The Plaintiff is only entitled to recover from the Defendant those sums actually owned by Roy Reeves, and the Plaintiff has failed to provide proof of the amount of Mr. Reeves' ownership interest in this account.

5. Defendant is therefore entitled to judgment as a matter of law.

WHEREFORE, the Defendant, National Bank of Commerce of Pine Bluff, prays that summary judgment be granted in its favor and that judgment be entered in its favor; for its costs expended and reasonable attorneys' fees.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611
BY: ______________________
TERRY F. WYNNE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiff, United States of America, moves the Court to enter an Order granting summary judgment in favor of the plaintiff and against the defendant.

As grounds for this motion, the plaintiff would show that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

In support of its motion, the plaintiff relies on the Amended Complaint, the Answer to Amended Complaint, the Stipulation of Facts and the Memorandum of Law which is attached hereto and made a part hereof.

Respectfully submitted.

GEORGE W. PROCTOR
United States Attorney
By: ______________________
LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes the Defendant, National Bank of Commerce of Pine Bluff, by its attorneys, Bridges, Young, Matthews, Holmes & Drake, and for its Response to Plaintiff's Motion for Summary Judgment and Memorandum of Law in support of same, states:

1. That the facts herein have been stipulated by the parties and those stipulations have been filed with this Court. In addition to the stipulations set out by the Plaintiff in its Motion, the parties also stipulated that "No further evidence as to the ownership of the monies in the subject bank accounts will be submitted."

2. While there is no genuine issue of fact, Plaintiff is not entitled to judgment. However, Defendant is entitled to summary judgment on its own Motion filed herein and/or dismissal pursuant to its Motion to Dismiss also filed herein.

3. As Plaintiff states in its brief on page 2: "Neither party to this action has any knowledge as to the ownership of the funds prior to the deposit in the accounts, and no evidence is before the Court on that point." Plaintiff also properly notes that "whether or not a particular item is property or rights to property of the taxpayer is a question of State law." (Page 3 of Plaintiff's Memorandum). And as Plaintiff notes *Hayden* v. *Gardner*, 238 Ark. 351 (1964) states that a "joint account should be garnishable in the proportion of the debtor's ownership of the funds". Plaintiff then states on page 4: "Once it is established under State law that the taxpayer has a right to particular property, Federal law determines whether the person in possession of such property is obligated to surrender the property." This is where Plaintiff's argument fails. It is stipulated by the parties that it is unknown which of the three parties on the bank account is the owner of the funds in it and is further stipulated that no evidence as to the ownership will be submitted in this case. Therefore, it has not been "established under State law that the taxpayer has a right to particular property". We do not know if the tax debtor owns all, none or some part of the deposits, and, since only property owned by the tax debtor is subject to levy, the Defendant cannot unilaterally turn over the deposits to Plaintiff without proof of their ownership. Obviously, it is the Plaintiff's burden to establish that the taxpayer has a right to the deposits in this case before the Defendant would be required to turn them over to the Plaintiff.

4. Plaintiff argues that the *Hayden* case places the burden on each joint depositor to show what portion of the funds he or she owns. This again points out the fallacy of Plaintiff's argument. Plaintiff has failed to join the co-depositors in its levy or this action so there is no possible way for them to establish what portion of the funds each owns. Plaintiff asserts that this is not fatal because the joint depositors possess a remedy under the Internal Revenue Code which would permit them to bring an action against the United States to recover any funds which belong to him. This argument totally ignores 26 U.S.C. § 7403(b) which provides: "All persons having liens upon or claiming any interest in the property involved in such actions (i.e. levy) shall be made parties thereto." Further, this argument would do nothing more than create a multiplicity of legal actions which could be avoided simply by the Plaintiff joining all parties to the account in its levy. This argument also disregards the fact that the co-depositors would likely file suit against the Bank also because it turned over funds of the co-depositors without ascertaining the respective interests of the depositors.

5. On page 5 of its brief, the Plaintiff finally states that the point of this action is that a Bank cannot refuse to honor a levy on a joint bank account simply because the taxpayer is only one of the depositors. It then states that the taxpayer clearly had an interest in the property. However, on the contrary, it has not been clearly established that the taxpayer has an interest in this joint account. Had Plaintiff joined the co-depositors as is required by *Hayden v. Gardner*, it may have been determined that the co-depositors were the sole owners of the monies on deposit with the Bank. However, Plaintiff has refused to join those persons and has stipulated that it will submit no evidence in this action as to the ownership interests involved in this account. Therefore, it has not been and cannot be established that the taxpayer has any ownership of the funds on deposit with the Defendant and therefore the Bank cannot be liable to the Plaintiff for refusing to turn over those deposits.

6. The real point of this case is that the Internal Revenue Service cannot require the Defendant to turn over all of the funds in a joint account in its possession without establishing the relative ownership interests of the parties to that account. The law requires the Plaintiff to establish the ownership interests of its tax debtor and it has failed to do so. For these reasons, Plaintiff's Motion should be denied and Defendant's Motion should be granted.

WHEREFORE, Defendant, National Bank of Commerce of Pine Bluff, prays that the Motion for Summary Judgment filed herein by Plaintiff be denied and that it take nothing thereby; that its own Motion for Summary Judgment be granted and judgment in its favor entered forthwith; and for all other proper relief.

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P.O. Box 7808
Pine Bluff, Arkansas 71611

By: ____________________

TERRY F. WYNNE
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

JUDGMENT

Pursuant to the Memorandum and Order filed in this matter this date, it is Considered, Ordered and Adjudged that this case be, and it is hereby, dismissed.

Dated this 14th day of December, 1982.

/s/ GARNETT THOMAS EISELE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS PINE BLUFF DIVISION

No. PB-C-81-340

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL BANK OF COMMERCE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the plaintiff, United States of America, appeals to the United States Court of Appeals for the Eighth Circuit from the Judgment and the Opinion entered in this action on December 14, 1982.

GEORGE W. PROCTOR
United States Attorney

By: ______________________________
LAWRENCE SHERLOCK
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530

No. 84-498

Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ORDER ALLOWING CERTIORARI. Filed *January 7, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.

(5)

No. 84-498

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Section 6331(a) of the Internal Revenue Code authorizes the IRS to collect unpaid taxes by levy upon "all property and rights to property * * * belonging to" a delinquent taxpayer. Section 6332(a) in turn requires any custodian of such "property" or "rights to property" to surrender it upon demand of the IRS. The question presented is whether, where a delinquent taxpayer has an unrestricted right under his contract with a bank and state banking law to withdraw without notice to his co-depositors the full amount on deposit in a joint checking or savings account, the IRS has a corresponding right to levy on the account in satisfaction of that taxpayer's tax liability, or whether (as the court of appeals held) the IRS must negate or quantify the potential claims of all the delinquent taxpayer's co-depositors as a precondition to a valid administrative levy.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-498

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 726 F.2d 1292. The opinion of the district court (Pet. App. 18a-29a) is reported at 554 F. Supp. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on January 31, 1984. A timely petition for rehearing was denied on April 30, 1984 (Pet. App. 31a). On July 21, 1984, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including September 27, 1984. The petition was filed on that date and was granted

on January 7, 1985 (J.A. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6321, 6331, 6332, 7403 and 7426 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Ark. Stat. Ann. §§ 67-521, 67-552 (1980) are set out in a statutory appendix (Pet. App. 32a-38a)

STATEMENT

1. Roy Reeves owes $857 in federal income taxes for 1977, based upon an assessment made against him on December 10, 1979 (Pet. App. 2a). He has a checking account and a savings account at the National Bank of Commerce, a banking corporation doing business in Pine Bluff, Arkansas (*id.* at 1a-3a). Both accounts are held in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves" (*id.* at 3a; J.A. 9, 14-15).[1] Each of the three, Roy, Ruby, and Neva, is authorized to withdraw money up to the full amount of the outstanding balance in each account (Pet. App. 3a; J.A. 9, 12). It is not known which of the three co-depositors owned the funds before the funds were deposited in the accounts, or in what proportion (Pet. App. 3a; J.A. 12, 22). It was stipulated below that no evidence would be submitted as to the co-depositors' respective claims, inter sese, to the funds (Pet. App. 3a; J.A. 17).

Section 6331(a) of the Code[2] provides that the IRS may collect the taxes of a delinquent taxpayer "by levy upon all property and rights to property * * * belonging to such person." Section 6332(a) in turn provides that anyone "in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" shall surrender such property or rights upon demand of the IRS. Pursuant to these Sections, the Commissioner, in an effort to collect Roy's unpaid taxes, served a notice of levy against the bank with respect to the two accounts described above. On the date the notice of levy was served—June 13, 1980—the balance in the checking account was $322 and the balance in the savings account was $1,242 (Pet. App. 3a; J.A. 11-12). The IRS demanded that the bank pay over to it sufficient monies from the accounts to satisfy Roy's $857 tax liability (J.A. 9, 12).

2. The bank refused to comply with the levy, contending that it did not know how much of the money on deposit belonged to Roy, as opposed to Ruby or Neva (Pet. App. 1a; J.A. 19). The government then brought this action against the bank in the United States District Court for the Eastern District of Arkansas, pursuant to Code Section 6332(c)(1). That Section provides that "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the [IRS], shall be liable in his own person and estate" up to the value of the property or rights not surrendered or the amount of the tax due, whichever is less. The government accordingly sought judgment against the bank in the amount of $857 (J.A. 7, 15).[3]

[1] Although the record does not reveal how the three co-depositors are related to one another, we understand that Neva is Roy's wife and that Ruby is his mother.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[3] In its original complaint (J.A. 7), the government also sought to collect a penalty from the bank in the amount of $428 under Section 6332(c)(2). That Section provides that, where a person's refusal to surrender property in response

The case was submitted to the district court on cross-motions for summary judgment and on the bank's motion to dismiss the complaint (Pet. App. 18a; J.A. 18-24).[4] The district court granted the bank's motion to dismiss, concluding (Pet. App. 23a) that due process mandates "something more" than the Code's levy procedures provide. In the court's view, "the minimum due process required in distraint actions against joint bank accounts" obligates the IRS to identify the delinquent taxpayer's co-depositors and provide them with notice and an opportunity to be heard (Pet. App. 24a-25a). The district court then outlined in detail the procedures it believed the Constitution requires the IRS to follow when levying on joint bank accounts.[5]

3. The court of appeals affirmed (Pet. App. 1a-17a).[6] Although it expressed no opinion on the constitutional analysis advanced by the district court (*id.* at 2a, 17a), it reached essentially the same result as a matter of statutory construction. In the court of appeals' view, the IRS, when levying on a joint bank account, must bear the burden of proving "the actual value of the delinquent taxpayer's interest in [the] jointly owned property" (*id.* at 2a). Since "the rights of the various parties" to the funds at issue here had not yet been determined (*id.* at

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to a levy is "without reasonable cause," he shall be liable, not only for the amount recoverable under Section 6332(c)(1), but also for a penalty "equal to 50 percent of [that] amount." The government eventually agreed to waive any claim to the Section 6332(c)(2) penalty in this case (J.A. 13), and the complaint was amended accordingly (*id.* at 15). Thus, no question concerning the Section 6332(c)(2) penalty is presented here.

[4] The bank's motion to dismiss was based on the theory that Roy's co-depositors were "indispensable parties" in the action seeking to hold it personally liable for refusing to honor the levy; the government's failure to join Ruby and Neva, the bank argued, thus mandated dismissal under Fed. R. Civ. P. 19(b) (Pet. App. 19a; J.A. 18). The bank suggested that joinder of Roy's co-depositors was required by analogy with Code Section 7403(b), which provides that, in a plenary action to foreclose an IRS tax lien, "[a]ll persons having liens upon or claiming any interest in the property * * * shall be made parties" (J.A. 23; Br. in Support of Motion to Dismiss 1-2). Alternatively, the bank suggested that joinder of Ruby and Neva was mandated by the provisions of Arkansas garnishment law, which the State's courts had interpreted to require that co-depositors be joined in an action of garnishment against a bank account (J.A. 23-24; Br. in Support of Motion to Dismiss 2-4). The district court did not specifically address the bank's Rule 19(b) argument.

[5] The district court held that a bank, upon receiving a notice of levy, should freeze the assets in the account and provide the IRS with the names of all co-depositors (Pet. App. 24a-25a). The IRS would then be required to notify the co-depositors and give them a reasonable time period "in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest [claimed] in the joint account" and the ground of their claim (*id.* at 25a). If the bank, on the basis of the affidavits, "believe[d] that a genuine dispute exist[ed] as to the legality of any ownership claim" made by the co-depositors, "it [might] refuse to surrender any portion of the funds so claimed" (*id.* at 29a). The IRS would then be forced to bring suit to enforce the levy, at which point "due process would require that the government * * * name the co-depositors as co-defendants with the bank" (*id.* at 25a).

[6] The court of appeals recited that the district court had "held for the bank on summary judgment" (Pet. App. 2a) and based its affirmance on a conclusion that "the summary judgment entered for the bank was proper" (*id.* at 17a). The district court, however, had not entered summary judgment for the bank, but rather had granted the bank's motion to dismiss the complaint (*id.* at 29a).

17a), the court concluded that the government had not shown the bank to be in possession of "property [or] rights to property * * * belonging to" Roy, as Section 6331(a) requires.

The Eighth Circuit acknowledged that, under Arkansas banking law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (Pet. App. 6a). The court also found some force in the argument that "the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy" (*id.* at 7a). The court nevertheless refused to accept the government's contention that it "st[ood] in Roy's shoes and could do anything Roy could do," pointing out that, "at least as to ordinary creditors, [that was] not the law of Arkansas." Under Arkansas garnishment law, the court noted, a creditor of a bank co-depositor is not "subrogated to that co-owner's power to withdraw the entire account." Rather, a creditor in an Arkansas garnishment proceeding "must join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account." *Ibid.*[7] The court of appeals concluded that a similar rule should apply in administrative levy proceedings under the Internal Revenue Code, and accordingly held that the government could not prevail

[7] The court observed that "[t]he rights of [bank co-depositors] *inter sese* are not determined by the cited Arkansas [banking] statutes," but rather "depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners" (Pet. App. 6a-7a).

without negating or quantifying the claims that Ruby or Neva might have to the funds in question.

In upholding the bank's refusal to honor the levy, the court of appeals also expressed the belief that IRS administrative levies are "not normally intended for use as against property in which third parties have an interest" or "against property bearing on its face the names of third parties" (Pet. App. 17a). The government's proper remedy in such situations, the court of appeals said, is to "bring[] suit to foreclose its lien under Section 7403, joining as defendants the * * * co-owners of the account" (*ibid*). The court appeared to agree with the government's contention that "a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy" (Pet. App. 11a). But the court rejected the reasoning of these cases, concluding that the possibility that Ruby and Neva might have claims to the funds justified the bank in refusing to honor the levy, and thus prevented the government from maintaining an action to impose personal liability upon it.

SUMMARY OF ARGUMENT

1. The question in this case is whether Roy's joint bank accounts were "property [or] rights to property belonging to" him and thus were subject to IRS levy in satisfaction of his taxes. In answering this question, state law determines the nature and extent of Roy's rights in the accounts. Federal law determines whether Roy's rights, as thus defined, constitute "property" or "rights to property" as those terms are used in the applicable sections of the Internal Revenue Code.

In *United States* v. *Bess*, 357 U.S. 51 (1958), this Court squarely held that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms has "property [or] rights to property" within the meaning of the Code's lien and levy provisions. The Court in *Bess* made clear that the right to enjoy possession of property—that is, the ownership of a power that may be exercised to create a beneficial interest in oneself—is the essence of a "right to property" for federal tax collection purposes. This principle is reflected in numerous decisions involving taxpayers' interests in property as diverse as bank accounts, trusts, commercial contracts, and insurance policies.

In the present case, Roy possessed the unrestricted right under state law and his contract with the bank to compel it to pay him the full outstanding balance in each account. He had the right to make withdrawals without notice to his co-depositors, and to withdraw funds for any reason he chose, including satisfaction of his federal taxes. This absolute right to compel payment and thus to enjoy possession of the funds was "property" or a "right to property" belonging to Roy within the meaning of Sections 6331 and 6332. Under the plain language of those Sections, therefore, the IRS had power to levy on the accounts to satisfy Roy's tax liability, and the bank is personally liable for its failure to honor the levy.

This straightforward statutory answer is strongly supported by common sense. It is hornbook tax law that the IRS "steps into the taxpayer's shoes" when levying on his property. The IRS, in other words, acquires whatever rights the taxpayer himself possesses. Since Roy had the right to withdraw money from the accounts and use it to pay his taxes, the IRS

by its levy sought to do exactly what he could have done of his own volition. It is inconceivable that Congress intended to prohibit the IRS from levying on property which, like the bank accounts here, is freely accessible to the delinquent taxpayer.

2. In rejecting this common-sense approach, the court of appeals relied largely on state garnishment law, under which Roy's creditors would not be subrogated to his right to withdraw and spend the funds and thus would not "stand in his shoes." It has been established for decades, however, that state creditors' rights laws do not bind the IRS in its efforts to collect taxes. Indeed, the restrictions imposed by state law on ordinary creditors' rights have no logical bearing on the question whether a taxpayer's state-defined interests are "property [or] rights to property belonging to" him within the meaning of the Internal Revenue Code. By remitting the IRS to only those remedies that an ordinary creditor would have under state law, the court of appeals has effectively deprived the Code's administrative levy provisions of any force in this context.

3. The court of appeals suggested that the bank could refuse to honor the levy because of the possibility that Roy's co-depositors might have competing claims to some or all of the funds on deposit. It has long been established, however, that potential disputes as to ownership are not a defense to a suit to enforce an IRS levy. Rather, Congress has provided that the custodian must surrender the property to the IRS at once, and that ownership disputes (if any) will be resolved in a post-seizure administrative or judicial proceeding initiated by the third-party claimant. This Court has repeatedly sustained the constitutionality of this post-seizure hearing proce-

dure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931)). In holding that the validity of such third-party claims must be finally resolved—indeed, that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required, the court of appeals ignored the statutory scheme that Congress established.

4. The court of appeals' errors appear with striking clarity when one considers the practical effect of its holding. Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. This is so because levy, as compared with seizure of physical assets and the Commissioner's various judicial remedies, is "quick and relatively inexpensive" (*United States* v. *Rodgers*, 461 U.S. 677, 699 (1983)). The IRS serves hundreds of thousands of levies on joint bank accounts every year. Banks have routinely honored such levies, co-depositors have rarely complained, and litigation has seldom resulted.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the proportionate "ownership interests" of the various co-depositors. This would make administrative levies so burdensome as to be impractical whenever a delinquent taxpayer's property is titled in more than one name. Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 629 (1968)). Who "owns" the funds in a joint checking account may

depend, for example, on who deposited the money, who wrote the checks, what the checks were used to pay for, and what sort of understanding (tacit or explicit) the parties might have had among themselves. Quite obviously, the IRS would not find it easy to bear the burden of proving all this in an administrative levy proceeding.

Faced with the virtual impossibility of resolving such ownership disputes administratively, the government would have no practical alternative but to follow the Eighth Circuit's suggestion (Pet. App. 17a) and bring suits under Code Section 7403 to foreclose its tax liens, joining all co-depositors as defendants. Since the IRS serves levies on several hundred thousand joint bank accounts every year, however, such suits would place an intolerable burden on the government and on the courts. In effect, the Commissioner's power of administrative levy could be nullified simply by the taxpayer's unilateral act of adding another person's name to his property, a result that Congress cannot possibly have intended.

ARGUMENT

SINCE THE DELINQUENT TAXPAYER HAD THE UNRESTRICTED RIGHT UNDER STATE LAW TO WITHDRAW THE FULL AMOUNT ON DEPOSIT IN HIS JOINT CHECKING AND SAVINGS ACCOUNTS, THE IRS HAD A CORRESPONDING RIGHT TO LEVY ON THOSE ACCOUNTS IN SATISFACTION OF HIS TAX LIABILITY, AND THE COURT OF APPEALS THUS ERRED IN DECLINING TO HOLD THE BANK PERSONALLY LIABLE FOR ITS REFUSAL TO HONOR THE LEVY

A. The Internal Revenue Code Grants the Commissioner Broad Power to Levy on All "Property and Rights to Property" Belonging to a Delinquent Taxpayer

1. Section 6321 of the Code provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same" after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." The lien generally arises when the assessment is made, and it continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time" (I.R.C. § 6322). In impressing a lien upon "all property and rights to property" belonging to a tax delinquent, Congress cast its net broadly to reach every interest in property that a taxpayer might have—including interests as diverse as options, contingent remainders, business licenses, unliquidated choses in action, and after-acquired property. See 4 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.4, at 111-100 (1981). Indeed, as this Court has noted, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes" (*Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945)).

A federal tax lien, however, is not self-executing. The IRS must take affirmative action to enforce collection of unpaid taxes, and the Code affords it two principal tools for that purpose. One of these tools is a lien-foreclosure suit. Section 7403(a) authorizes the Attorney General, at the request of the Secretary of the Treasury, to institute a civil action in federal district court to enforce a tax lien and "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax." All persons "having liens upon or claiming any interest in the property" must be joined as parties (I.R.C. § 7403(b)). A lien-foreclosure suit is a plenary action in which the court "adjudicate[s] all matters involved" and "finally determines the merits of all claims to and liens upon the property" (I.R.C. § 7403(c)). The court may decree sale of the property and distribution of the proceeds "according to the findings of the court in respect to the interests of the parties and of the United States" (*ibid.*). See generally *United States* v. *Rodgers*, 461 U.S. 677, 680-682 (1983); 4 Bittker, *supra*, ¶ 111.5.6, at 111-112.

Alternatively, the IRS may collect unpaid taxes by administrative levy, a procedure that, unlike the procedure described above, typically "does not require any judicial intervention" (*Rodgers*, 461 U.S. at 682). Section 6331(a) provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property * * * belonging to such person or on which

there is a [federal tax] lien." Section 6331(b) defines "levy" to include "the power of distraint and seizure by any means."

Where the taxpayer's property is held by a third party, the IRS typically serves a "notice of levy" upon the custodian pursuant to Section 6332(a). That Section provides that

> any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

The notice of levy gives the IRS the right to all property levied upon, whether tangible or intangible (*United States* v. *Eiland*, 223 F.2d 118, 121 (4th Cir. 1955)), and creates a custodial relationship between the person holding the property and the IRS, so that the property comes into the constructive possession of the government (*Phelps* v. *United States*, 421 U.S. 330, 334 (1975)). If the custodian honors the levy, he is "discharged from any obligation or liability to the delinquent taxpayer with respect to [the] property or rights to property" thus surrendered (I.R.C. § 6332(d)).

If the custodian refuses to honor a proper levy, on the other hand, he incurs liability to the government for his refusal. Section 6332(c)(1) provides that

> [a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum * * *.

Such personal liability is necessary to enforce IRS levies. Without it, people could ignore levies with impunity and the government's ability to collect taxes would be seriously impaired.[8]

Administrative levy "is a summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims." *United States* v. *Sullivan*, 333 F.2d 100, 116 (3d Cir. 1964). The levy is "a provisional remedy."

[8] Section 6332(c)(1) has its roots in Section 1114(e) of the Revenue Act of 1926, ch. 27, 44 Stat. 117. Congress explained that earlier enactment (S. Rep. 52, 69th Cong., 1st Sess. 38 (1926)) as follows:

> The existing law permits distraint upon personal property of a delinquent taxpayer even though in possession of another person. The committee amendment specifically makes it the duty of the possessor to surrender the property upon which a levy is made, and imposes upon him * * * a civil liability, if he fails to do so, equal to the value of the property, but not exceeding the amount of tax, a liability similar to that of an executor who pays debts before he pays a debt due to the United States.

We have found no other legislative history discussing this provision. In order to make clear that the government is not entitled to recover against *both* the custodian *and* the tax delinquent, Congress amended Section 6332(c)(1) in 1966 to provide explicitly that "[a]ny amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made." Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b)(4), 80 Stat. 1136.

4 Bittker, *supra*, ¶ 111.5.5, at 111-108. Unlike a lien-foreclosure suit, it does not determine "whether the government's rights to the seized property are superior to those of other claimants," but it does protect the government "against diversion, loss, or concealment of the property" while such claims are being resolved (*id.* at 111-108, 111-111). The "underlying principle" justifying administrative levies is "the need of the government promptly to secure its revenues." *Phillips* v. *Commissioner*, 283 U.S. 589, 596 (1931). Indeed, "the existence of the levy power is an essential part of our self-assessment tax system," for it "enhances voluntary compliance in the collection of taxes that this Court has described as 'the life-blood of government.'" *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977) (quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)). Among the chief advantages of administrative levy "is that it is quick and relatively inexpensive" (*Rodgers*, 461 U.S. at 699). Indeed, "[i]n terms of cost, time, and energy, [it] normally constitutes the least expensive method by which the government may collect an assessed tax." W. Plumb, *Federal Tax Liens* 256 (3d ed. 1972). The constitutionality of the levy procedure "has long been settled." *Phillips*, 283 U.S. at 595. Accord, *e.g.*, *G.M. Leasing Corp.*, 429 U.S. at 352 n.18; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972).

2. In the present case, the IRS decided to pursue the administrative route and to collect Roy's unpaid taxes by levying upon his bank accounts. It is well established that bank accounts are a species of property "subject to levy" within the meaning of Section 6332(a). Levies on bank accounts have been permitted since 1924 (Revenue Act of 1924, ch. 234,

§ 1016, 43 Stat. 343), and the Treasury Regulations explicitly state that "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property * * * including * * * bank accounts" (Treas. Reg. § 301.6331-1(a)(1)).[9] Although the Code specifies certain types of property that are exempt from IRS levy,[10] none of those exemptions covers bank accounts.

The courts have uniformly held, in accordance with the plain language of Sections 6331 and 6332, that a bank (or other person) served with an IRS notice

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[9] Technically, of course, a bank account establishes a debtor-creditor relationship between the bank and its depositor. Section 6332(a) takes care of this technicality by providing that the IRS may serve a notice of levy upon anyone "in possession of (*or obligated with respect to*) property or rights to property," and by requiring that such person "surrender such property (*or discharge such obligation*) to the Secretary."

[10] Section 6334 enumerates nine classes of property that, while not exempt from the incidence of the federal tax lien, are exempt from administrative levy. Such items include wearing apparel and school books, furniture and personal effects, tools of a trade or profession, unemployment benefits, undelivered mail, certain pension and annuity payments, workmen's compensation, judgments in support of minor children, and a minimum amount of wages or salary (I.R.C. § 6334(a)(1) through (9)). These exemptions are exclusive. Section 6334(c) provides that, "[n]otwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by" Section 6334(a). And Congress in enacting that Section made clear that "[p]rovisions of State law cannot grant an exemption from levy." S. Rep. 1622, 83d Cong., 2d Sess. 578 (1954). Accord, *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971).

of levy "has only two defenses for a failure to comply with the demand." *United States* v. *Sterling National Bank*, 494 F.2d 919, 921 (2d Cir. 1974) (citing cases). One defense is that the person is neither "in possession of" nor "obligated with respect to" property or rights to property belonging to the tax delinquent. The other defense is that the taxpayer's property is "subject to a prior judicial attachment or execution." *Id.* at 921. Accord, *e.g.*, *Bank of Nevada* v. *United States*, 251 F.2d 820, 824 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958); *Commonwealth Bank* v. *United States*, 115 F.2d 327, 330-331 (6th Cir. 1940); M. Saltzman, *IRS Practice and Procedure* ¶ 14.16, at 14-80 (1981) (citing cases).

The bank in this case was obviously "obligated with respect to" the bank accounts in question because, as it concedes (Br. in Opp. 12), it was "obligated to honor any withdrawal requests Roy might make." And the bank has never suggested that the accounts were subject to a prior judicial attachment or execution. The controlling question, therefore, is whether those accounts constituted "property [or] rights to property * * * belonging to" Roy (I.R.C. § 6331(a)).

B. The Delinquent Taxpayer's Unrestricted Right to Compel Payment of the Account Balances to Him Constituted "Property [or] Rights to Property" Within the Meaning of Section 6331(a)

1. In deciding whether an entitlement amounts to "property [or] rights to property" within the meaning of Sections 6321 and 6331, " 'state law controls in determining the nature of the legal interest which the taxpayer ha[s] in the property.' " *Aquilino* v. *United States*, 363 U.S. 509, 513 (1960) (quoting

Morgan v. *Commissioner*, 309 U.S. 78, 82 (1940)). Accord, *e.g.*, *Rodgers*, 461 U.S. at 683. This principle follows from the fact that the Internal Revenue Code "creates no property rights, but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). But while the existence of rights or interests is a question of state law, "[t]he classification of [those] interests is a federal question." *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F.2d 142, 144 (2d Cir. 1957). The levy and lien provisions of the Code, in other words, "require the courts to determine for federal purposes whether [the] state-created interests are 'property' or 'rights to property' " as those words are used in Sections 6321 and 6331. *Fidelity & Deposit Co.*, 241 F.2d at 144. Accord, *e.g.*, *J.A. Wynne Co.* v. *R. D. Phillips Constr. Co.*, 641 F.2d 205, 208 (5th Cir. 1981); *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 272-273 (5th Cir. 1976); *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1105 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977); W. Plumb, *Federal Tax Liens*, *supra*, at 27; M. Saltzman, *supra*, ¶ 14.08, at 14-34; Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1486-1487 (1964). "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of" Internal Revenue Code, the
in short, "state law is inoperative" and the tax consequences thenceforth are dictated by federal law (*Bess*, 357 U.S. at 56-57).

The application of these principles is illustrated by this Court's decision in *United States* v. *Bess*, *supra*. The question there was whether a delinquent taxpayer's interests in insurance policies covering his life constituted "property [or] rights to property" to

which a federal tax lien could attach (357 U.S. at 55). After noting that "the rights of the insured are measured by the policy contract as enforced by [relevant] state law," the Court held that the insured did not have " 'property' or 'rights to property' in the [insurance] proceeds, within the meaning of [the predecessor of Section 6321]" (357 U.S. at 55-56). The Court reasoned that the insured "could not enjoy the possession of the proceeds in his lifetime" and that the proceeds were "reducible to possession by another only upon [his] death" (*ibid.*). Contrariwise, the Court held that the insured did have " 'property' or 'rights of property,' within the meaning of [the predecessor of Section 6321], in the cash surrender value" (357 U.S. at 56). The Court reasoned that the insured had "the right under the policy contract to compel the insurer to pay him this sum" and thus possessed "a chose in action * * * which he could have collected from the insurance companies in accordance with the terms of the policies" (357 U.S. at 56 (original quotation marks omitted)). The Court accordingly held that the insured's interest in the cash surrender value was subject to the federal tax lien. The fact that "under state law the insured's property right represented by the cash surrender value [was] not subject to creditors' liens" was, in the Court's analysis, irrelevant (357 U.S. at 56-57).

This Court's decision in *Bess* makes clear that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms has "property [or] rights to property" within the meaning of Section 6331.[11] Indeed, the

[11] Although the question in *Bess* concerned attachment of the federal tax lien (I.R.C. § 6321) rather than exercise of the Commissioner's power of administrative levy (I.R.C. § 6331), the formula set forth in the Code is the same under both Sections. In each case, the IRS may reach all "property and rights to property * * * belonging to" the delinquent taxpayer. See pages 12-15, *supra*. The same principles apply in determining the meaning of the words "property" and "rights to property" as used in each Section. See, *e.g.*, 4 Bittker, *supra*, ¶ 111.5.4, at 111-101.

Eighth Circuit itself has held, on another occasion, that "[t]he unqualified contractual right to receive property is itself a property right subject to seizure by levy." *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (1980). And it makes no difference whether the "contract" in question is a trust indenture,[12] an ordinary commercial contract,[13] an insurance policy,[14] or (as here) a bank account. In each case, the determination whether a taxpayer has "property [or] rights to property" within the meaning of Section 6331 depends on whether state law

[12] *E.g.*, *St. Louis Union Trust Co.*, 617 F.2d at 1302 (levy on bank that had "a fixed contractual obligation to pay [trust] income" to taxpayer). See Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 618-621 (1968) (collecting cases and concluding that IRS levy should be able to "reach during a taxpayer's lifetime any income or corpus (whether in trust or a legal interest) which the taxpayer could reach by the exercise of a power of revocation, appointment or invasion for his own benefit").

[13] *E.g.*, *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980) (levy on contractor that was "obligated to deliver" money to taxpayer).

[14] *E.g.*, *Bess*, 357 U.S. at 56-57. In 1966, Congress amended Section 6332, consistently with this Court's decision in *Bess*, to make clear that the IRS can levy on the cash surrender value of a life insurance policy. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b), 80 Stat. 1135 (currently codified in I.R.C. § 6332(b)). See S. Rep. 1708, 89th Cong., 2d Sess. 17-19 (1966).

gives him a "right to compel payment," that is, endows him with powers of disposition that may "be exercised to create a beneficial interest in * * * himself." Note, *supra*, 77 Harv. L. Rev. at 1488-1489.

2. In the instant case, the question whether Roy had a "right * * * defined by state law" (*Bess*, 357 U.S. at 55) is measured by his contract with the bank, as enforced by relevant Arkansas statutory provisions. See *id.* at 55-56; *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105-1107; *United States* v. *Bowery Savings Bank*, 297 F.2d 380, 382-383 (2d Cir. 1961); Rev. Rul. 55-187, 1955-1 C.B. 197. Under Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts without notice to his co-depositors.[15] The bank for its part was obligated to honor any withdrawal requests Roy might make, again up to the full amount of the accounts.[16] Indeed, the bank stipulated that Roy "was authorized to make withdrawals from the * * * accounts" (J.A. 12), and it is beyond dispute that he was authorized to withdraw all of the available funds for whatever reason he chose. The Eighth Circuit thus correctly concluded that, under Arkansas law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (Pet. App. 6a).

[15] The relevant Arkansas statutes provide that, if a checking or savings account is opened in the names of two or more persons, whether as joint tenants, tenants by the entirety, tenants in common or otherwise, all monies deposited become the property of such persons as joint tenants, each person having the unrestricted right to withdraw the entire sum. See Ark. Stat. Ann. §§ 67-521, 67-552 (1980) (*reprinted in* Pet. App. 37a-38a). (Effective March 25, 1983—well after the issuance of the notice of levy in the present case—the relevant Arkansas banking statutes were recodified without substantial change. See Pet. App. 4a-5a & n.3.)

[16] The relevant Arkansas statutes provide that "a banking institution shall pay withdrawal requests * * * and otherwise deal in any manner with the account * * * upon the direction of any one (1) of the persons named therein * * * unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required". Ark. Stat. Ann. § 67-552(d) (1980). The bank has never suggested that such "written instructions" existed here.

That conclusion should have brought the court of appeals' analysis swiftly to an end. Here, as in *Bess*, Roy had the absolute right under state law and his contract with the bank "to compel [it] to pay him" the full outstanding balance in the joint checking and savings accounts, and he thus possessed "a chose in action * * * which he could have collected from the [bank] in accordance with the terms of" those accounts (*Bess*, 357 U.S. at 56). That right constituted "property [or] rights to property belonging to" Roy within the meaning of Section 6331(a), for it was a power of disposition that he could have exercised at any time "to create a beneficial interest in * * * himself" (Note, *supra*, 77 Harv. L. Rev. at 1489). The bank, in turn, was "obligated with respect to" Roy's right to property (I.R.C. § 6332(a)), since state law required it to honor any withdrawal requests, up to the full outstanding balance, that Roy might make. The bank thus had no basis for refusing to honor the levy, and the courts below erred in de-

clining to hold it personally liable under Section 6332 (c)(1) in the amount of Roy's $857 unpaid tax liability.

3. The vast majority of the courts that have considered the question have held, consistently with the view we urge here, that a delinquent taxpayer's unrestricted right to withdraw funds from a bank account constitutes "property" or "rights to property" subject to IRS levy, regardless of the fact that there may exist other claims to the funds on deposit and that the question of ultimate ownership may thus be unresolved. In *United States* v. *Sterling National Bank*, 494 F.2d 919 (2d Cir. 1974), a bank contended that its depositor had no "property [or] rights to property" in a checking account because the bank had an unexercised right of setoff (494 F.2d at 921). After consulting relevant state law, the Second Circuit (*id.* at 922) rejected this argument:

> Under any realistic definition of "property" the full amount in [the delinquent taxpayer's] account was his property or his right to property. Until the bank acted to restrict his right to draw on the funds, [the taxpayer] was entitled to write checks up to the full amount in the account. * * * * * At any time up to when the IRS served its notice of levy, [the taxpayer] could have written a check payable to the IRS for the balance of his account. Here the IRS was asserting no right to the funds in the checking account that [the taxpayer] did not already have.

The Second Circuit accordingly held that "all the funds in [the delinquent taxpayer's] checking account were his property" and hence were subject to levy in satisfaction of his taxes (*ibid.*). The same result has been reached, for substantially similar

reasons, by the Fifth [17] and the Ninth Circuits,[18] by numerous district courts,[19] and by the IRS in its published rulings.[20]

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[17] See *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105-1107 (delinquent taxpayer had "property [or] rights to property" in bank account where bank's right of setoff was unexercised and the taxpayer "was permitted to withdraw from his account"); *Citizens & Peoples National Bank* v. *United States*, 570 F.2d 1279, 1282-1284 (5th Cir. 1978) (same, where bank had received checks drawn on delinquent taxpayer's account but had not yet decided whether to pay them).

[18] See *Babb* v. *Schmidt*, 496 F.2d 957, 958-960 (9th Cir. 1974) (delinquent taxpayer had "property [or] rights to property" up to full value of joint bank accounts under state community property law); *Bank of Nevada* v. *United States*, 251 F.2d 820, 824-826 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958) (delinquent taxpayer had "property [or] rights to property" in bank account where bank's right of setoff was "inchoate" and "contingent"); *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972) (same, where bank's right of setoff was unexercised and the taxpayer was "free to withdraw from his account").

[19] See *United States* v. *Equitable Trust Co.*, 49 A.F.T.R.2d (P-H) ¶ 82-428 (D. Md. 1982) (delinquent taxpayer had "property [or] rights to property" up to full value of joint checking account where he had "the absolute right to use or withdraw the entire fund"); *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S.D. Cal. 1965) (delinquent taxpayer had "property [or] rights to property" up to full value of joint savings account where each codepositor "was entitled to the whole of said account"); *Tyson* v. *United States*, 63-1 U.S. Tax Cas. (CCH) ¶ 9300 (D. Mass. 1962) (same, where "either depositor could withdraw all of the funds in the account"); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152, 155-156 (M.D. Pa. 1953) (same).

[20] *E.g.*, Rev. Rul. 79-38, 1979-1 C.B. 406, 407 (delinquent taxpayer has "property [or] rights to property" in uncollected

This substantial body of judicial authority, rejected by the court of appeals below, is firmly supported by common sense. It is well established that the IRS in a levy proceeding " 'steps into the taxpayer's shoes.' " *Rodgers*, 461 U.S. at 691 n.16 (quoting 4 Bittker, *supra*, ¶ 111.5.4, at 111-102); M. Saltzman, *supra*, ¶ 14.08, at 14-32. The IRS, in other words, acquires whatever rights the taxpayer himself possesses.[21] Since Roy had the right to withdraw the outstanding balance in each bank account and use it to pay his taxes, the IRS, by virtue of the levy, sought to do on his behalf exactly what he could have done of his own volition. In such circumstances, where a bank depositor under state law has the unrestricted right to withdraw funds from the account, "it is inconceivable that Congress * * * intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor." *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972). Accord, *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1107.

funds where, "by custom or agreement between the bank and the customer, the customer has a legal, fixed right to draw against [such] funds").

[21] See, *e.g.*, *St. Louis Union Trust Co.*, 617 F.2d at 1302 ("The IRS acquired the same right to receive and spend the entire amount of the [trust] income that [the taxpayer] had at the time the tax lien arose"); S. Rep. 1708, 89th Cong., 2d Sess. 19 (1966) ("[T]he effect of honoring the levy is the same as honoring a demand of the taxpayer.").

C. The Justifications Advanced by the Court of Appeals Do Not Support Its Decision to Remit the IRS to Only Those Remedies That an Ordinary Creditor Would Have Under State Law

The Eighth Circuit's decision in this case is the only recent appellate decision to sustain a bank's refusal to honor an IRS levy in circumstances like those here.[22] The court adduced three principal justifica-

[22] As noted in our petition (at 18 n.12), the only appellate authority even arguably supporting the court of appeals' result is *United States* v. *Stock Yards Bank*, 231 F.2d 628 (6th Cir. 1956). The Sixth Circuit there ruled that the IRS could not levy on United States savings bonds held in the names of a husband and wife to satisfy the former's tax liability, reasoning that "[p]roof of the actual value of the taxpayer's interest was an essential element of the government's case" (231 F.2d at 631). The *Stock Yards Bank* decision, however, involved a significantly different legal and factual environment than that involved in this case. The Sixth Circuit emphasized that the form of co-ownership in which the United States savings bonds were held was not a joint tenancy but "rather [was] an estate the limitations and conditions of which are delineated by the terms of the contract and by federal law" (*id.* at 630). The applicable federal regulations provided that "if a debtor * * * is not the sole owner of the bond, *payment will be made only to the extent of his interest therein*, which must be determined by the court or otherwise validly established" (31 C.F.R. 315.13 (1955) (quoted in 231 F.2d at 631) (emphasis added by the court of appeals)). In *Stock Yards Bank*, therefore, other, more particularized provisions of federal law placed a gloss on the term "property [or] rights to property" as generally used in Section 6331(a); the provisions of Arkansas garnishment law, obviously, can impose no such gloss on that term here. As the court below recognized (Pet. App. 10a n.6), moreover, *Stock Yards Bank* was decided before the enactment (in 1966) of Code Section 7426, which permits third parties claiming an interest in seized property to bring "wrongful levy" actions against the government. See pages 32-34, 37-38, *infra*. In sum, while we think that the Sixth Cir-

tions to support its result. First, it believed that result to be required by the provisions of Arkansas law governing the rights of creditors generally. Second, it reasoned that the bank had a defense because Ruby and Neva might have competing claims to part or all of the funds on deposit. Third, and more generally, it suggested that "levy is not normally intended for use as against property * * * bearing on its face the names of third parties, and in which those parties likely have a property interest" (Pet. App. 17a). There is no merit to any of these theories.

1. In holding that Roy did not possess "property [or] rights to property" on which the IRS could levy, the court of appeals relied heavily on Arkansas creditors' rights law. It rejected the government's contention that the IRS in a levy proceeding "would stand in Roy's shoes and could do anything Roy could do," reasoning that, "at least as to ordinary creditors, [that] is not the law of Arkansas" (Pet. App. 7a). Under Arkansas garnishment law, as construed by that State's courts, a creditor of a bank co-depositor is not "subrogated to that co-owner's power to withdraw the entire account" (*ibid.*, citing *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W. 2d 752 (1964)). Rather, a creditor in an Arkansas garnishment proceeding must "join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account" (Pet. App. 7a). The court of appeals believed that a similar rule should apply in federal tax collection cases involving joint bank accounts. It accordingly concluded (*id.* at

cuit reached the right result on the facts presented in *Stock Yards Bank*, we disagree with much of that court's reasoning and believe that the case should be confined to the narrow situation there involved.

17a) that the government may not effectively levy on such accounts but must bring a Section 7403 action to foreclose its tax lien, joining all co-depositors as defendants.

This reasoning seriously misconceives the role properly played by state law in federal tax collection matters. As noted above (at 18-21), this Court has repeatedly held that state law is relevant only in "determining the *nature of the legal interest* which the taxpayer ha[s] in the property . . . sought to be reached" by the federal taxing statute. *Aquilino*, 363 U.S. at 513 (emphasis added; original quotation marks omitted). Once the nature of the taxpayer's legal interest is defined, the question whether that interest constitutes "property" or "rights to property," as those terms are used in Sections 6321 and 6331, is a question of federal law. *Bess*, 357 U.S. at 56-57; *J.A. Wynne Co.*, 641 F.2d at 208; *Randall*, 542 F.2d at 272-273; *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105; *Fidelity & Deposit Co.*, 241 F.2d at 144; W. Plumb, *Federal Tax Liens*, *supra*, at 27; M. Saltzman, *supra*, ¶ 14.08, at 14-34; Note, *supra*, 77 Harv. L. Rev. at 1486-1487. The fact that under state law ordinary creditors may be unable to reach the full value of the taxpayer's legal interest, therefore, does not determine whether that interest constitutes "property [or] rights to property" within the meaning of Section 6331(a). In *Bess*, this Court held it irrelevant that "under state law the [taxpayer's] property right * * * was not subject to creditors' liens," ruling that, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements

of [the predecessor of Section 6321], state law is inoperative" (357 U.S. at 56-57 (citations omitted)).[23]

Contrary to the court of appeals' conclusion, therefore, the facts that under Arkansas law Roy's creditors (unlike Roy himself) could not exercise his right of withdrawal in their favor (Pet. App. 7a) and would have to join his co-depositors in a garnishment proceeding (*ibid.*) are irrelevant in answering the question presented here. The federal statute, after all, refers to *the taxpayer's* property and rights to property, not to his creditor's rights. Yet the court of appeals has effectively deprived the federal levy statute of all independent force, by remitting the IRS to only the rights that an ordinary creditor of the taxpayer would have under state law. That result is plainly wrong, for it is to "compare the government to a class of creditors to which it is superior" (*Randall*, 542 F.2d at 274 n.8).

[23] The Court in *Bess* observed that state creditors' rights laws "are not laws for the United States * * * unless they have been made such by Congress itself" and that "[t]he provisions of the Internal Revenue Act creating liens upon taxpayer's property for unpaid taxes * * * do not specifically provide for recognition of such state laws" (357 U.S. at 57 (original quotation marks omitted)). Congress has similarly provided that the Code's exemptions from the levy power are exclusive (I.R.C. § 6334(c)) and that "[p]rovisions of State law cannot grant an exemption from levy." S. Rep. 1622, *supra*, at 578. These well-established propositions reflect the more general principle that "[t]he exertion of [the federal taxing] power is not subject to state control" and that "[s]tate law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932). See *Springer* v. *United States*, 102 U.S. 586, 594 (1881).

Here, as in *Bess*, Roy had the unqualified right under state law to compel the bank to pay him the full outstanding balance in each account. That right belonging to Roy constituted "property [or] rights to property" within the meaning of Section 6331(a). The court of appeals erred in concluding that the restrictions imposed by Arkansas garnishment law on creditors generally could alter that result.

2. As a second justification for declining to impose personal liability on the bank, the court of appeals suggested that a custodian of property may "assert[], as a defense to a Section 6332 action to enforce the levy, that someone other than the taxpayer ha[s] an interest in the property" (Pet. App. 13a). The court noted that Ruby and Neva were nominal co-owners of the accounts and that their "rights [might] be affected if the levy [were] honored" (*id.* at 10a). It was thus proper for the bank, in the Eighth Circuit's view, to refuse to comply with the levy "until the rights of the various parties have been determined" (*id.* at 17a). A contrary rule, the court said, "might expose the bank to double liability"—once to the IRS, and possibly again "after being sued by Ruby or Neva" (*id.* at 15a).

This reasoning is spurious. To begin with, the courts have uniformly held that a person served with a notice of levy has two—and only two—possible defenses for failure to comply with the demand: (1) that he is not in possession of the taxpayer's property, and (2) that the property is subject to a prior judicial attachment or execution. *E.g.*, *United States* v. *Sterling National Bank*, 494 F.2d at 921; *Bank of Nevada* v. *United States*, 251 F.2d at 824; *Commonwealth Bank* v. *United States*, 115 F.2d at 330-331. See M. Saltzman, *supra*, ¶ 14.16, at 14-80. The fact

that other parties may have competing claims to the property is not one of these defenses.[24] Indeed, a custodian of property must honor an IRS levy even if he *himself* asserts a claim superior to the government's tax lien. 4 Bittker, *supra*, ¶ 111.5.5, at 111-110. This is because administrative levy "is only a provisional remedy" (*id.* at 111-108). "[T]he final judgment in [a levy] action settles no rights in the property subject to seizure" (*United States* v. *New England Merchants National Bank*, 465 F. Supp. 83, 87 (D. Mass. 1979)), and does not determine "whether the government's rights to the seized property are superior to those of other claimants." 4 Bittker, *supra*, ¶ 111.5.5, at 111-108.

This is not to say, of course, that the rights of other claimants are ignored under the Internal Revenue Code. In enacting the Code's summary collection

[24] See, *e.g.*, *J.A. Wynne Co.*, 641 F.2d at 207 (general contractor required to honor levy on funds due subcontractor notwithstanding "possible claims [to the funds] by * * * sub-subcontractors"); *United States* v. *Sterling National Bank*, 494 F.2d at 921 (bank required to honor levy on funds due depositor notwithstanding bank's claimed right of setoff); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499, 500 (E.D. Pa. 1977) (bank required to honor levy on funds due alleged nominee of taxpayer notwithstanding former's possible claim to the funds); *Determan* v. *Jenkins*, 111 F. Supp. 604, 605 (N.D. Ga. 1953) (police chief required to honor levy on currency taken from decedent "even though [he] knew at the time that [another party] was claiming the same"). It is accordingly well established that the IRS "has no duty to give notice to possible third party claimants or to search for them as a condition to enforcement of the levy." *Dieckman* v. *United States*, 550 F.2d 622, 624 (10th Cir. 1977) (per curiam). Accord, *e.g.*, *Douglas* v. *United States*, 562 F. Supp. 593, 596-597 (S.D. Ga. 1983), aff'd, 723 F.2d 919 (11th Cir. 1983).

procedures, Congress fully recognized that the IRS would occasionally levy in error, and that, "where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court." S. Rep. 1708, 89th Cong., 2d Sess. 29 (1966). Congress accordingly provided in Section 7426 of the Code that a person claiming an interest in property seized for another's taxes may bring a "wrongful levy" action against the United States to have the property (or the proceeds of its sale) returned.[25] Congress likewise provided, in Section 6343(b), that an aggrieved claimant may file, before proceeding to court, an administrative request for return of the property at issue. See Treas. Reg. § 301.6343-1(b)(2). This Court has repeatedly sustained the constitutionality of this post-seizure hearing procedure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips*, 283 U.S. at 595) because "the very existence of government depends upon the prompt collection of the revenues" (*G.M. Leasing Corp.*, 429 U.S. at 352 n.18).

In its solicitude for the potential claims of Roy's co-depositors, the court of appeals has ignored the statutory scheme that Congress established. Con-

[25] Section 7426(a) provides that any person (other than the taxpayer himself) who claims an interest in or lien on property and who claims "that such property was wrongfully levied upon may bring a civil action against the United States in a [federal] district court." The word "wrongful" as used in Section 7426(a) refers not to intentional wrongdoing on the government's part, but rather "refers to a proceeding against property which is not the taxpayer's." S. Rep. 1708, *supra*, at 30. If the taxpayer himself seeks relief from an allegedly wrongful levy, his proper avenue of redress is to file a refund suit under Section 7422.

gress determined that the interests of the government in the speedy collection of taxes and the interests of other claimants to the delinquent taxpayer's property are best reconciled by permitting the IRS to levy on the taxpayer's assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial hearing. Indeed, the courts repeatedly have held that, "[w]hen someone other than the taxpayer claims an interest in property or rights to property which the United States has levied upon, his exclusive remedy against the United States is a wrongful levy action under I.R.C. § 7426." *United Sand & Gravel Contractors, Inc.*, 624 F.2d at 739.[26] The court below erred in concluding that the validity of such third-party claims must be finally resolved—indeed, that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required. In effect, the court created a third defense for failure to honor a levy, a defense not authorized by the language or policy of Section 6332.

Similarly, there is no merit to the court of appeals' suggestion (Pet. App. 14a-16a) that the bank could refuse to comply with the levy because to comply "might expose [it] to double liability." To begin with, the statute admits of no such defense.[27] And even if the statute did permit such a defense, the bank could not qualify for it here. As noted above (at 14), a person who honors an IRS levy is "discharged from any obligation or liability to the delinquent taxpayer with respect to [the] property or rights to property" surrendered (I.R.C. § 6332(d)). Although no provision of the Code would explicitly immunize the bank from suits by Roy's co-depositors, the Code does provide a federal administrative remedy (I.R.C. § 6343(b)) and a federal judicial remedy (I.R.C. § 7426) to third parties who believe that their property has been wrongfully seized for another's taxes. See pages 32-34, *supra*. Since federal remedies would be available to Ruby and Neva, it is highly questionable whether the bank, consistently with established preemption principles, could be held liable under state law in an action by Roy's co-depositors for complying with an IRS levy, if (as here) the state would not have imposed liability on the bank for permitting Roy himself to withdraw the funds. Cf. *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967).

In any event, the bank would have a complete defense under state law to any such action by Roy's co-depositors. Arkansas law provides that a bank's payment to any one depositor constitutes "a valid and sufficient release and discharge of said bank" from co-depositors' claims, absent written notice from them

[26] Accord, *e.g.*, *Valley Finance, Inc.* v. *United States*, 629 F.2d 162, 170-171 (D.C. Cir. 1980), cert. denied, 451 U.S. 1018 (1981) ("[a]s a third party challenging the government's [levy, the plaintiff's] proper avenue of redress is in the District Court under section 7426"); *Douglas* v. *United States*, 562 F. Supp. at 594 (where "[t]he essence of the plaintiff's case is that the IRS wrongfully levied upon her property in order to satisfy [someone else's] tax liability * * * the claimant's exclusive remedy is a wrongful-levy action under [I.R.C.] § 7426"); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 500 (holding that competing claimants' proper course was a Section 7426 suit in which they "may contest their designation as nominees and all other questions may be resolved").

[27] See, *e.g.*, *United States* v. *Capital Savings Ass'n*, 576 F. Supp. 790 (N.D. Ind. 1983), on appeal, No. 84-2961 (7th Cir. 1984); *United States* v. *Third National Bank*, 111 F. Supp. at 156.

not to pay.[28] Ark. Stat. Ann. §§ 67-521, 67-552(h) (1980) (*reprinted in* Pet. App. 37a-38a). Since the government stands in the shoes of the delinquent taxpayer when levying on a joint bank account, the bank's payment to the IRS in effect would be a constructive payment to Roy, and hence would likewise insulate the bank from actions by Ruby or Neva. See, *e.g.*, *United States* v. *Bowery Savings Bank*, 297 F.2d 380 (2d Cir. 1961); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 499-500; *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S.D. Cal. 1965); *Determan* v. *Jenkins*, 111 F. Supp. at 605; *Wechsler* v. *Home Savings & Loan Ass'n*, 57 Cal. App. 3d 563, 129 Cal. Rptr. 380 (1976).

3. As a final justification for refusing to impose personal liability on the bank, the court of appeals theorized that an IRS levy "is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties" (Pet. App. 17a). The court appeared to recognize that Congress's enactment of Section 7426—which permits wrongful-levy actions by "any person * * * who claims an interest in" seized property—tended to undermine this theory. But the court suggested that the Section 7426 remedy is designed to protect only those third parties

[28] The bank has never suggested that such written instructions from Roy's co-depositors existed here (see pages 22-23 & note 16, *supra*). In circumstances where a bank had received such instructions before the notice of levy was served, it could file an interpleader action under 28 U.S.C. 2410. That Section permits the United States to "be named a party in any civil action * * * of interpleader * * * with respect to * * property on which the United States has or claims a * * * lien."

"whose property has been seized 'inadvertently'" (Pet. App. 17a). Here, the court noted, the joint bank accounts bore on their face the names of Roy's co-depositors, so that the government's attempt to seize their property, in the court of appeals' view, was "not at all inadvertent" (*ibid.*).

This rationale, too, is erroneous. To start with, the collection provisions of the Code plainly contemplate that a taxpayer's interest in property may be less than fee ownership. The federal tax lien attaches, not only to the taxpayer's "property," but also to his "rights to property," and the lien may be enforced by levy against such "rights." I.R.C. §§ 6321, 6331. Thus, the fact that a taxpayer is not the sole owner of property does not insulate his interest, however limited, from federal tax collection procedures. In enacting Section 7426, moreover, Congress said that the wrongful-levy remedy was intended to be available whenever the IRS levies "on property which, *in part at least*, a third person considers to be his" (S. Rep. 1708, *supra*, at 29 (emphasis added)). This language makes clear that Congress envisioned levies on jointly-owned or co-owned property.

Nor is there merit to the Eighth Circuit's notion that the Section 7426 remedy is confined to situations where the IRS acts "inadvertently," by which the court seemed to mean "without notice that potentially competing claims exist." The wording of Section 7426 —which permits suit by "any person" who claims an interest in seized property—surely provides no basis for distinguishing among various species of third-party claimants. The legislative history of the Section likewise provides no basis for such a distinction, for it defines a "wrongful levy" quite simply as "a proceeding against property which is not the taxpay-

er's" (S. Rep. 1708, *supra*, at 30). And the result produced by the Eighth Circuit's suggested reading would be anomalous, for it would leave third-party claimants without recourse where the seizure is "advertent," that is, where the IRS arguably has notice of their potentially competing claims. Indeed, if the bank in this case had honored the levy, Ruby and Neva on the court of appeals' theory would be unable to vindicate in court whatever interest they might have in the funds on deposit. Surely Congress did not intend that Section 7426, a remedial statute, should be construed in so whimsical a manner, or that the government should be able "with impunity [to] seize property of innocent third parties by levy procedures" provided only that it knows about their claims ahead of time. *Al-Kim, Inc.* v. *United States*, 610 F.2d 576, 580 (9th Cir. 1979).

This Court's decision in *United States* v. *Rodgers*, *supra*, contrary to the court of appeals' conclusion (Pet. App. 16a-17a), does not support its reasoning on this score. The question in *Rodgers* was whether Section 7403—which authorizes the government (see page 13, *supra*) to bring plenary judicial actions to foreclose its tax liens—empowers a district court to order the sale of a family home in which a delinquent taxpayer has an interest, but in which the taxpayer's nondelinquent spouse also has a homestead interest under state law. This Court held that sale of the entire property, and not merely of the delinquent taxpayer's interest in the property, is permitted, provided that the non-delinquent spouse is compensated out of the sale proceeds for his or her homestead stake (461 U.S. at 698-700). In so ruling, the Court compared Section 7403's operation with that of Section 6331, noting (461 U.S. at 696) that "Section 6331,

unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331."

The court of appeals below read this passage from *Rodgers* to "impl[y] that levy is not normally intended for use * * * against property bearing on its face the names of third parties, and in which those parties likely have a property interest" (Pet. App. 17a). But the *Rodgers* opinion contains no such implication. The Court in *Rodgers* correctly pointed out that Section 6331 does not "implicate the rights of third parties" because an administrative levy, unlike a judicial lien-foreclosure action, does not determine ultimate ownership rights where such rights are in dispute. See pages 15-16 & 32, *supra*. Rather, Congress has provided that third parties' competing claims to property levied upon will be resolved *after* the levy is made, in a post-seizure administrative or judicial hearing. See *Rodgers*, 461 U.S. at 696 (citing I.R.C. §§ 6343(b) and 7426); pages 32-34, *supra*. Nothing in *Rodgers* suggests that this Court would invalidate an IRS levy on a bank account—where (as here) the delinquent taxpayer has the unrestricted right to obtain the full outstanding balance at any time without notice to his co-depositors—merely because the account "bear[s] on its face the names of third parties."

Indeed, in *G.M. Leasing Corp.*, *supra*, this Court specifically upheld the validity of an IRS levy on property bearing on its face the name of a third party —a straw man found to be the delinquent taxpayer's alter ego (429 U.S. at 350-351). The lower courts have repeatedly sustained levies in a variety of similar circumstances. See, *e.g.*, *Valley Finance, Inc.*, 629

F.2d at 165 (alter ego of taxpayer); *Babb* v. *Schmidt*, 496 F.2d at 958-960 (co-depositor of taxpayer); *James E. Edwards Family Trust* v. *United States*, 572 F. Supp. 22 (E.D.N.M. 1983) (trust found to be a nullity); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 499-500 (nominee of taxpayer); *United States* v. *Equitable Trust Co.*, 49 A.F.T.R.2d (P-H) ¶ 82-428 (D. Md. 1982) (co-depositor of taxpayer); *Sebel*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (same). As explained more fully below (see pages 40-44, *infra*), the IRS serves several hundred thousand notices of levy on joint bank accounts every year, and it has levied on various types of jointly-held property for many decades. This consistent pattern of administrative interpretation is entitled to considerable deference, and it points up the fallacy of the court of appeals' notion that levies are "not normally intended for use" (Pet. App. 17a) against such property.

D. The Court of Appeals' Decision Would Pose a Serious Threat to the Federal Tax Collection Process

In holding that a bank may refuse to honor an IRS levy on accounts in which third parties have an interest, the decision below would seriously impair the government's ability to collect taxes. It would impose burdens of staggering dimension not only on the IRS and the federal courts, but on the banking system and taxpayers themselves. Indeed, the Eighth Circuit's ruling would effectively preclude administrative levies whenever a taxpayer's property is titled in joint names.

Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. During the past three and a half years, the IRS has served nearly five million notices of levy, principally

on employers and banks.[29] The chief advantage of administrative levies is their nonjudicial nature, a characteristic that renders the collection process both expeditious and inexpensive. See page 16, *supra*. Although a levy does not determine ultimate ownership rights where such rights are in dispute, it does protect the government "against diversion, loss, or concealment of the property" in the interim. 4 Bittker, *supra*, ¶ 111.5.5, at 111-108.

It is common knowledge that American taxpayers frequently hold financial assets, particularly bank accounts, in joint names. Indeed, during the past three and a half years, the IRS has served notices of levy on some 800,000 joint bank accounts.[30] The IRS estimates that, in about half these cases, the account was held in the names of a delinquent taxpayer and a "third party"—*i.e.*, a party who did not share liability for the tax delinquency—the levy being predicated on the delinquent taxpayer's right unilaterally to withdraw the entire balance. Very few of these cases resulted in litigation, be it an enforcement action by the Commissioner or a wrongful levy action by the co-depositor. Rather, the bank simply paid the funds to the IRS, the taxpayer acquiesced, the co-depositor raised no objection, and no one ever went to court.

[29] The IRS has provided us with the following breakdown of levies served during fiscal 1981-1984:

	Total Levies	Levies On Banks
FY 1981	740,103	308,622
FY 1982	1,058,452	441,374
FY 1983	1,390,900	580,005
FY 1984	1,484,000	600,000

[30] Statistics referred to in this brief are derived from IRS records and were provided to us by the Service.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the proportionate "ownership interests" of the delinquent taxpayer and his various co-depositors. This would make administrative levies so burdensome as to be impractical whenever a delinquent taxpayer's property is titled in more than one name. The task of sorting out the potential claims inter sese of joint tenants is "an impossible burden to cast upon a party not privy to the confidential relationship normally existing between such co-owners." Plumb, *supra*, 77 Yale L.J. at 629. Under Arkansas law, for example, as the Eighth Circuit observed below, "[t]he rights of the co-owners *inter sese* * * * depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among them" (Pet. App. 6a-7a). Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, 77 Yale L.J. at 629), typically entailing "[a] long series of deposits which cannot be traced to their source, and a similar series of withdrawals which cannot be traced to their destination." *Park Enterprises, Inc.* v. *Trach*, 233 Minn. 467, 471-472, 47 N.W.2d 194, 197 (1951). The decision below would invite self-serving affidavits by delinquent taxpayers and their co-depositors, all of whom will typically be related, if not by blood, by friendship or commercial ties. Quite obviously, proving the respective "ownership interests" of such co-depositors is a burden that the IRS, at the administrative levy stage, would not find easy —indeed, would typically find impossible—to bear.[31]

[31] Even in state garnishment proceedings, the courts have recognized the virtual impossibility of requiring a creditor to prove how much of a joint bank account is "owned" by one of the co-depositors. In *Park Enterprises, Inc., supra*, for example, the Minnesota Supreme Court held that a creditor could garnish the full amount on deposit in a joint account for the individual debt of one co-depositor, reasoning that "courts should not encourage parties to do their bookkeeping in court when, by virtue of their private contract, they have virtually declared that they do not wish to be inconvenienced by strict accountability as between themselves" (233 Minn. at 471-472, 47 N.W.2d at 197). Similarly, in a decision relied on by the Eighth Circuit below (Pet. App. 7a), the Arkansas Supreme Court held that all the funds in a joint account "are prima facie subject to garnishment," with the burden being placed on the nondelinquent co-depositor "to show what portion of the funds he or she actually owned." *Hayden* v. *Gardner*, 238 Ark. 351, 354, 381 S.W. 2d 752, 754 (1964). The Arkansas court reasoned that the co-depositor should bear the burden of proof because he would be "in a much better position than the judgment creditor to know the pertinent facts" (238 Ark. at 354, 381 S.W. 2d at 754). Ironically, if the Eighth Circuit below had strictly followed the rationale of *Hayden*, it would have placed the burden of proof, not on the IRS, but on the bank, which was indirectly asserting Ruby's and Neva's claims. See *Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977) (reasoning that it is appropriate for the person in possession of property "to carry the burden of showing non-ownership by the taxpayer as a defense because the purpose of the statute is a coercive one which seeks to foster swift tender of property which has been levied upon"). Accord, *United States* v. *Montchanin Mills, Inc.*, 512 F. Supp. 1192, 1195 (D. Del. 1981); Rev. Rul. 55-187, 1955-1 C.B. 97. The more practical solution, however, is the one that Congress in fact adopted: the immediate securing of the funds by IRS levy, with a subsequent opportunity for competing claimants to assert and prove their claims in a post-seizure administrative or judicial hearing. See pages 32-34, *supra*.

Faced with the difficulty of resolving ownership disputes administratively, the IRS, if it wished to pursue a delinquent taxpayer's interest in a joint bank

account, would have no practical alternative but to follow the Eighth Circuit's suggestion (Pet. App. 17a) and bring a lien-foreclosure suit under Section 7403, joining all co-depositors as defendants. But this would place an enormous burden on the Commissioner and on the courts. As noted above, the IRS in the past three and a half years has served notices of levy on some 400,000 joint bank accounts titled in the names of a delinquent taxpayer and a "third party." The Service estimates that slightly more than half of these cases—200,000 or more—would have involved sufficient tax liabilities to justify the time and expense of litigation. This number of additional cases would cost the government tens of millions of dollars to litigate and would impose a tremendous strain on the federal courts, not to mention the Nation's banks. The fiscal impact would be aggravated by the delay in collecting hundreds of millions of dollars in revenues while the litigation was pending, as well as by the risk that the bank accounts would be depleted in the interim.[32]

Given the prohibitive cost of litigating over levies on joint bank accounts, the Commissioner would be forced by the decision below to consider other collection measures, such as seizures of delinquent taxpayers' houses, cars, and other tangible property. At present, the IRS generally tries to collect unpaid taxes by levies on intangible assets rather than by

[32] In these and other respects, as a leading commentator has noted, "the Government has a very real stake in preventing its less expensive and [less] time-consuming administrative remedy from being rendered impotent by its too-frequent abandonment in the face of what it believes to be frivolous competing claims." W. Plumb, *Federal Tax Liens, supra,* at 256.

seizure of tangible property—a preference explained by the fact that seizure and sale of tangible property involve a slow and drawn-out process, often burdensome to the taxpayer, invariably costly for the IRS, and usually unpleasant for all concerned.[33] Under the decision below, however, the Commissioner would have no alternative but to take more collection action against physical property.

Finally, the decision below would provide tax protestors and other tax evaders with a new and effective means to delay or defeat collection of the tax. Some 37,000 illegal protest returns were filed in fiscal 1983, a six-fold increase over the comparable figure for 1978. Tax protestors could take advantage of the Eighth Circuit's decision simply by adding extra names—accommodating relatives, or other tax protestors—to their bank accounts. This might be all that would be necessary to immunize relatively small accounts from enforced collection, since the IRS would not likely find it profitable to litigate such cases. Alternatively, a taxpayer with a delinquent tax liability might attempt to "launder" deposits to a joint account through a "third party" co-depositor, hoping that the Commissioner would be unable to prove which money was whose. Although such schemes can be exposed, the attendant costs are large. And, significantly, tax protestors might well rely on the decision below to bring suits against banks that continue to honor—correctly, in our view—IRS levies

[33] During fiscal 1983, for example, the IRS served 1,390,900 notices of levy and executed only 15,554 seizures—a ratio of about 100 to one. Seizures are far more expensive because they entail, *e.g.*, courthouse searches for prior liens, expenses of appraising and advertising the property, and costs of execution.

on joint accounts of the sort involved here. Although banks would almost certainly have valid defenses to such suits (see pages 35-36, *supra*), the expense of litigating even frivolous cases could be substantial.

In *Bull* v. *United States*, 295 U.S. 247, 259 (1935), this Court declared that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." The administrative levy system is a time-honored, congressionally-authorized collection technique designed to ensure that this need is equitably met. The decision below constitutes an unprecedented, unwarranted, and wholly impractical limitation on the right of the United States to collect its taxes in that way.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

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IN THE

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA ..... PETITIONER

VS

NATIONAL BANK
OF COMMERCE .... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NATIONAL BANK OF COMMERCE

BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
Attorneys at Law
315 East Eighth Avenue
P. O. Box 7808
Pine Bluff, AR 71611-7808
Telephone No. (501) 534-5532
Attorneys for Respondent

The Perdue Co., Inc., Pine Bluff, Ark.

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IN THE

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA ..... PETITIONER

VS

NATIONAL BANK
OF COMMERCE .... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NATIONAL BANK OF COMMERCE

SUMMARY OF ARGUMENT

1. The question presented as set out by Petitioner may be restated to ask: Has the IRS demonstrated Respondent is in possession of property or rights to property belonging to the tax debtor as such property or rights to property is defined under Arkansas law? The simple and obvious answer, as found by the District Court and the court of appeals, is that the IRS has not met this burden.

While Roy Reeves did have a right under Arkansas law to make withdrawals from the bank accounts in question, this right, under Arkansas law, does not establish any ownership interests (or "property or rights to property"). Under Arkansas law, the existence of a joint account is not determinative of the ownership interests of the joint depositors and therefore does not determine whether, where a tax debtor is one of the co-depositors, the depository bank has in its possession property or rights to property belonging to the tax debtor.

Specifically, Arkansas law clearly states that ownership interests are not determined or created simply by the existence of a joint account. It is therefore unnecessary to proceed beyond Arkansas law to reach the conclusions reached by the court of appeals, and by simply looking to Arkansas law it is clear that the court of appeals was correct.

Petitioner incorrectly states that Roy had the right to withdraw money from the accounts *and use it to pay his*

taxes. However, we only know that he had the right to withdraw the money and do not know whether, even after withdrawal, he would have the right to use it to pay his taxes. This is so because it has not been proven by the IRS that Roy owned the money in the account or had any right to it other than that bestowed by the Arkansas joint account statutes which Arkansas case law conclusively states is not determinative of ownership interests. While as between the bank and Roy, Roy indeed had a right to withdraw the sums, as between Roy and the co-depositors, we do not know whether he had any rights to the money.

While the Petitioner is correct in stating that the court of appeals relied extensively on an Arkansas case involving state garnishment law, it misconstrues the import of the decision relied upon. That decision *[Hayden vs. Gardner*, 238 Ark. 351, 381 S.W.2d 752 (1964)] is not simply a decision setting out the procedures for garnishment under Arkansas law, but in fact reenforces that the existence of a joint account is not determinative of the ownership interests of the respective parties to the account. By pointing out that case, the court of appeals is not as the Petitioner states: ". . . remitting the IRS to only those remedies that an ordinary creditor would have under state law . . .", but is setting out authority for its decision that the IRS has not demonstrated the bank to be in possession of any property or rights to property belonging to Roy.

2. Finally, that the collection of taxes may be made more burdensome by the decision of the court of appeals gives the IRS no authority to exceed that granted it by

Congress. The IRS has the authority only to levy against property or rights to property belonging to the tax debtor. Personal liability can be imposed against someone refusing to honor a levy only if that person is in possession of such property. If the IRS cannot establish that the property or rights to property in question belong to the tax debtor, no personal liability upon the person in possession can be imposed.

ARGUMENT

A. THE BANK HAS NOT BEEN SHOWN TO BE IN POSSESSION OF PROPERTY OR RIGHTS TO PROPERTY BELONGING TO THE TAX DEBTOR.

The court of appeals was correct in determining that the tax debtor's right to withdraw from the joint account does not establish, under Arkansas law, that the bank was in possession of property or rights to property belonging to the tax debtor.

As noted by the Petitioner, the IRS may attempt to collect unpaid taxes under the administrative levy procedure provided in Section 6331(a) of the Internal Revenue Code. The method of instituting that procedure is found in Section 6332(a) which provides for the serving of a notice of levy on any person in possession of property or rights to property belonging to the tax debtor. Upon receipt of such notice, the person in possession of the property or rights to property must then surrender it to the

IRS or be subjected to personal liability under Section 6332(c) (1).

However, as the Petitioner agrees: "'state law controls in determining the nature of the legal interest which the taxpayer [h]as in the property' ". *Aquilino vs. United States*, 363 U.S. 509, 513 (1960) (quoting *Morgan vs. Commissioner*, 309 U.S. 78, 82 (1940)). While the classification of property interests is a federal question, "... the existence of the interests to be federally classified, however, is solely a question of state law." *Fidelity and Deposit Co. vs. New York City Housing Authority*, 241 F.2d 142, 144 (2nd Cir. 1957). That is, if state law, as here, says no property interest exists merely from the fact that an individual is named on a joint account, the inquiry ends and there are no property interests to be federally classified. In this case, state law, alone, creates the legal interests, if any. As noted by Petitioner on page 19 of its brief, " '[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of the Internal Revenue Code, in short, 'state law is inoperative' and the tax consequences thenceforth are dictated by federal law." [quoting from *United States vs. Bess*, 357 U.S. 51, 56-57 (1958)]. Conversely, when, as here, state law clearly states the existence of a joint account does not create such sufficient interests, the federal tax consequences cannot attach and the search for the existence or nonexistence of sufficient interests must continue and extend beyond simply the surface appearance of the jointly held account. Since, according to *Bess*, the property rights, if any, must be defined by state law, the court of

appeals correctly found it necessary to extensively consider Arkansas law beyond the joint account statutes to determine the applicable law.

Roy's right to withdraw from the joint accounts was established by Ark. Stat. Ann. §67-521 (1980) and Ark. Stat. Ann. §67-552 (1980), amended by 1983 Ark. Acts No. 843, Section 1, which in summary provide that if an account is opened in the name of two or more persons, the bank may pay withdrawal requests upon the direction of any one of the named persons. The Petitioner asks that the Court go no further in its analysis of this case. However, these statutes are clearly not the Arkansas law to which must be referred to determine the nature of Roy's legal interest in the joint accounts. The state law which determines the nature of the legal interest which the taxpayer has in the property must be consulted, and, at least in Arkansas, that state law is a decision of the Arkansas Supreme Court and not the Arkansas Statutes just cited. In *Black vs. Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), the Arkansas Supreme Court found that Ark. Stat. §67-521 was:

> "passed for the protection of the bank in which the deposit was made . . . the statute effects no investiture of title as between the depositors themselves, but only relieves the bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved."

It is therefore clear that in Arkansas the right to

withdraw sums from a joint account is not alone property or even a right to property. The property interests of the joint account holders must be determined from facts other than only the existence of a joint account. See also, *McGuire vs. Benton State Bank*, 232 Ark. 1008, 342 S.W.2d 79 (1961).

As noted by the court of appeals (Pet. App. 6a-7a):

> Thus, Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income tax, and his co-owners would have had no lawful complaint against the bank, but they might have had a claim against Roy for conversion. The rights of the co-owners *inter sese* are not determined by the cited Arkansas Statutes. Those rights depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners, or on some other applicable rule of state law.

This analysis by the court of appeals is exactly accurate. The bank does not know whether Roy has any ownership interest in the account deposits, and the IRS has failed to offer any evidence of that interest. The IRS levy authority extends only to property or rights to property belonging to the tax debtor, and under Section 6332, the bank would be liable in its own person only if it were in possession of property or rights to property belonging to the tax debtor. Since, after referring to state law, the ownership interests in the account deposits have not been

established in this case, there can be no liability of the bank to the IRS.

The IRS, through its levy procedure, does step into the taxpayer's shoes, but at the same time it can stand in no better shoes. *U.S. vs. Sterling National Bank*, 494 F.2d 919 (2nd Cir. 1974). "The IRS acquires by its lien and levy no greater right to property than the taxpayer himself at the time the tax lien arises." *St. Louis Union Trust Co. vs. United States*, 617 F.2d 1293, 1301 (8th Cir. 1980). "[T]he tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out" or do not exist. 4 Bittker, paragraph 111.5.4 at 111-102.

The Petitioner argues that Roy had the right to withdraw the outstanding balance in the bank accounts and use it to pay his taxes. There is absolutely no proof that Roy had any right whatsoever to use the money on deposit to pay his taxes. That could be determined only by resorting to state law to determine whether Roy actually owned any of the sums on deposit. Roy's right to use the money to pay the taxes would be determined not by his being named on the joint account, but by those factors set out by the court of appeals in its opinion. (See App. Pet. 6a-7a). Since the Petitioner failed to present those factors, it is not known what rights Roy may have had or what shoes, if any exist at all, the IRS may have been able to step into.

Hayden vs. Gardner, 238 Ark. 351, 381 S.W.2d 752 (1964) confirms that under Arkansas law the IRS has failed

to establish whether the account deposits are property or a right to property belonging to Roy. The Petitioner argues that the court of appeals, by its partial reliance upon the *Hayden* case, has left the IRS with only the rights that an ordinary creditor of the taxpayer would have under state law. However, the Petitioner has incorrectly analyzed the *Hayden* decision. That case, while it did indeed deal with the garnishment rights of an ordinary creditor, actually confirms the rule of *Black vs. Black*, and *McGuire vs. Benton State Bank* that the existence of a joint account alone does not determine the respective property rights of the parties to the account or that any party of the account has any interest in the account deposits at all. *Hayden* further confirms that, in this case, the IRS must do something more than simply show that the tax debtor is named on a joint account to prove the existence of property or a right to property belonging to the tax debtor. Since the parties stipulated that no further evidence as to the ownership of the monies in the subject bank accounts would be submitted (J. A. 17), the IRS cannot meet its burden of establishing under state law the nature of the legal interests, if any, Roy has in the subject bank accounts.

Petitioner correctly cites *United States vs. Bess*, 357 U.S. 56 (1958), as meaning that state law restrictions on ordinary creditors are inapplicable to the IRS. However, Petitioner fails to note the obvious distinction between that case and this. In *Bess*, it was undisputed the tax debtor had a right to require payment to herself of the cash surrender value of a life insurance policy. It was also not disputed that she would be the sole owner of the surrender value.

This clearly established the existence of property belonging to the tax debtor under state law even though other New Jersey law exempted the cash surrender value from creditor's liens. Here, no such property right has been, or can be, defined under Arkansas law so that the rule of *Bess* that state law restrictions do not apply to the IRS is irrelevant to this decision.

While the Petitioner notes in its brief (pp. 42-43, note 31), "[I]ronically, if the Eighth Circuit below had strictly followed the rationale of *Hayden*, it would have placed the burden of proof, not on the IRS, but on the bank, which was indirectly asserting Ruby's and Neva's claims. See *Flores vs. United States*, 551 F.2d 1169, 1174 (9th Cir. 1977) . . .", it is interesting to note that the Court in *Flores* placed the burden upon the IRS to demonstrate under state law sufficient facts to indicate the tax debtor had an interest in the account in question. While *Flores* was a wrongful levy case, the burden placement should be the same in this, an action to impose personal liability for denial of a levy. We know, under Arkansas law, to demonstrate a co-depositor has an interest in the joint account, the IRS must do something more than simply show the tax debtor is named on the account. *Black vs. Black, supra*.

Once the court of appeals had correctly determined the appropriate state law applicable to this case, it also correctly found *United States vs. Stockyards Bank of Louisville*, 231 F.2d 628 (6th Cir. 1956) supported its reasoning. Petitioner asserts *Stockyards Bank* involved a

significantly different legal and factual environment than that involved in this case. (App. Brief p. 27, note 22). However, the court of appeals correctly analyzed that the only difference in *Stockyards Bank* and the case at hand is that the property rights in *Stockyards Bank* depended on federal law while here they depend on state law. (App. Pet. 10a). The court of appeals then correctly determined that whether state or federal law must be consulted to determine the property interests is of no consequence and found that if that controlling law, as here, requires something more to determine ownership than simply showing joint title then that additional proof must be submitted before the levy authority can be exercised. The Eighth Circuit's decision is therefore in accord with and supported by that of the Sixth Circuit in *Stockyards Bank*.

The Eighth Circuit also correctly found support for its decision in the dictum of this Court in *United States vs. Rodgers*, 103 S.Ct. 2132 (1983), where this Court said:

> Section 6331, unlike Section 7403 does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by Section 6331. Indeed third parties whose property or interest in property have been seized inadvertently are entitled to claim that the property has been "wrongfully levied upon," and may apply for its return either through administrative channels, 26 U.S.C. §6343(b), or through a civil action filed in a federal district court, §7426(a) (1); see §7426(b) (1), 7426(b) (2) (A). (Pet. App. 16a).

This Court in the *Rodgers* decision and the Eighth Circuit in the decision below have placed their fingers on the impropriety of using the Section 6331 levy procedure when the property being sought is in a joint bank account and ownership of the balance of the account is not known. The IRS has two available methods to collect its revenues, the Section 6331 levy procedure and the Section 7403 lien procedure. The Petitioner seems to argue that the two statutes are essentially fungible since it argues that the IRS always has the choice of utilizing either of these statutes whenever a taxpayer is delinquent. If this were the case, why would Congress create the two different methods? Why would it not have provided a single levy procedure and required all joint owners to bring an action against the United States for wrongful levy under Section 7426(a) (1)?

The obvious answer is that Congress intentionally devised two procedures: one, the levy procedure, to be used where ownership is not in question, and the other, the lien procedure, where ownership is not known or disputed. This is because, as the Sixth Circuit stated:

> It should be pointed out . . . that distraint is a rough and ready remedy. This shortcut form of self-help developed by the common law has been available to the government and pursued a delinquent taxpayer since the 18th century. Where the value and nature of the taxpayer's property rights are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue Laws. But it is a blunt instrument, iladapted to carve out property interests where their nature and extent are unclear.
>
> There is available to the government an alternative remedy well-designed to resolve the issues in the present case. Under Section 3678 of the Internal Revenue Code of 1939, the United States can bring suit against the bank to enforce a lien on the bonds and name both the taxpayer and his wife co-defendants. In such a proceeding the extent of the taxpayer's interest in the bonds can be finally adjudicated, and the rights of all parties fully protected. *United States vs. Stockyards Bank of Louisville*, 231 F.2d 628, 631-32 (6th Cir. 1956).

B. THE SUPPOSED THREAT OF THE COURT OF APPEAL'S DECISION TO THE FEDERAL TAX COLLECTION PROCESS DOES NOT JUSTIFY ALLOWING THE IRS TO EXCEED ITS GRANTED AUTHORITY.

The Petitioner argues that ". . . the Eighth Circuit's ruling would effectively preclude administrative levies whenever a taxpayer's property is titled in joint names." (Pet. Brief p. 40). Petitioner argues that administrative levies would be thwarted because taxpayers across the country would place their accounts in joint names and effectively prohibit the IRS from exercising its levy authority.However, this potential difficulty does not justify the IRS in seizing through the levy procedure, property or rights to property not belonging to the tax debtor. Congress

has given it the authority only to levy on property or rights to property belonging to the tax debtor, and to allow the IRS to levy upon property which, under state law, has not been demonstrated to belong to the tax debtor would be to allow the IRS to exceed its statutory authority.

This horrific potential is no greater than the possibility that all tax debtors might create an alter ego to hold their property or place the property entirely in the possession of a straw man or nominee. The IRS has successfully combated such tactics to avoid tax liability. See *DiEdwardo vs. First National Bank*, 442 F.Supp. 499 (E.D. Tenn. 1977) and *Valley Finance, Inc. vs. United States*, 629 F.Supp. 162 (D.C. Cir. 1980).

Instead of disabling the IRS's tax collection activities, affirmance of the Eighth Circuit's decision would provide innocent co-depositors (at least in Arkansas) with protection against unauthorized seizure by the IRS of their money and would protect banks (again, at least in Arkansas) from having to independently adjudicate the rights of co-depositors in the account in their hands and from the potential liability they might face if they make an incorrect adjudication.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Mr. Terry F. Wynne
BRIDGES, YOUNG, MATTHEWS,
HOLMES & DRAKE
P. O. Box 7808
Pine Bluff, Arkansas 71611
Telephone No. (501) 534-5532
Attorneys for National Bank
of Commerce